Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1994

State of Michigan,
Petitioner,

-vs-

Frank Garcia,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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139 pp

QUESTION PRESENTED

Should this Court grant certiorari to clarify double jeopardy jurisprudence where the decisions throughout the country are in disarray on the question of whether the doctrine of "implied acquittal" operates to preclude a retrial of a lesser-included "predicate" offense which operates to aggravate a greater offense (i.e., felony murder, and the predicate felony), where jury instructional error at defendant's first trial prevented the jury from actually adjudicating the merits of the lesser-included offense sought to be stricken at the retrial.

Table of Contents

Page

Index of authorities . . . . iv-vii

Petition for certiorari to the Michigan Supreme Court. 1

Citations to opinions below 2

Jurisdiction. 2

Constitutional provision involved . . . 3

Statement of facts 4-7

Reasons for granting writ 8-60

Relief 60

Appendix 1a-70a

[Index to appendix]

Page

People v Garcia, 203 Mich App 420, 513 NW2d 425 (1994). 1a-8a

People v Garcia, 448 Mich 442, 531 NW2d 683 (1995). 9a-69a

People v Garcia, [order denying reh., May 30, 1995]. 70a

Index to cases & authorities

Page

Cases

Addison v Parratt, 208 Neb 459, 303 NW2d 785 (1981) 15
Anderson v Green, 513 US ___, 130 L Ed 2d 1050, 1053, ___ S Ct ___ (1995) . .12,13
Angstrohm Precision v Vishay Intertechnolgy, 567 F Supp 537 (ED NY, 1982). 56
Ashe v Swenson, 397 US 436, 25 L Ed 2d 469, 90 S Ct 1189 (1970) . . . . 29,30,32,43,44,51,52 ,53,59
Ball v United States, 163 US 662, 41 L Ed 300, 16 S Ct 1192 (1896) . .15
Benton v Maryland, 395 US 784, 23 L Ed 2d 707, 89 S Ct 2956 (1969). 8
Burks v United States, 437 US 1, 57 L Ed 2d 1, 98 S Ct 2141 (1978) 16
Chicos v State, 246 Ind 680, 208 NE2d 685 (1965) 36
Cichos v Indiana, 385 US 76, 17 L Ed 2d 175, 87 S Ct 271 (1966) 12,35
Commonwealth v Klobuchir, 486 Pa 241, 405 A2d 881 (1979) 26
Commonwealth v Nardone, 406 Mass 123, 546 NE2d 359 (1989) . . . 33,34,35 ,36,37
Commonwealth v Tabb, 491 Pa 372, 421 A2d 183 (1980) 26
Commonwealth v Ward, 493 Pa 115, 425 A2d 401 (1981) 26,27
Dedrick v State, 623 SW2d 332 (Tex Crim App, 1981) 57
Dowling v United States, 493 US 342, 110 S Ct 668,107 L Ed 2d 708 (1990) 44
Edmonds v United States, 106 US App DC 373, 273 F2d 108 (1959) . . .12,18 ,19,22
Ex parte Campbell, 872 SW2d 48 (Tex, 1994) 58,59
Ex parte Lane, 806 SW2d 336 (Tex App-Fort Worth 1991) 58
Ex Parte Traver, 725 SW2d 195 (Tex Crim App, 1986) 57

Fong Foo v United States, 369 US 141, 7 L Ed 2d 629, 82 S Ct 671 (1962). .44,45
Forsberg v United States, 351 F2d 242 (CA9 1965) 21
Garcia v State, 768 SW2d 726 (Tex Crim App, 1987) . . . . . .56 ,57,58
Gikas v Zolin, 863 Cal Rptr 745 (1993) .24
Green v United States, 355 US 184, 2 L Ed 2d 199, 78 S Ct 221 (1957). .9
Harris v Oklahoma, 433 US 682, 53 L Ed 2d 1054, 97 S Ct 2912 (1977) . .40 ,41,43
Illinois v Vitale, 477 US 410, 65 L Ed 2d 228, 100 S Ct 2260 (1980) . .41 ,42,43
Johnson v Commonwealth of Virginia, 221 Va 736, 273 SE2d 784 (1981). .12,18 ,20,21
Kairys v INS, 981 F2d 937 (CA7 1992) . .44
Kennedy v Washington, 986 F2d 1129 (CA7 1993) . . . . .8,32 ,44,45
Lett v State, 727 SW 2d 367 (Tex App - Fort Worth 1987) 54
Magee v Superior Court, 34 Cal App 3d 201, 109 Cal Rptr 758 (1973) . .46 .49,50
Mauk v State, 91 Md App 456, 605 A2d 157 (Md 1992). 11
Montana v Hall, 481 US 400, 95 L Ed 2d 354, 107 S Ct 1825 (1982). 16,37
Montana v United States, 440 US 147, 59 L Ed 2d 210, 99 S Ct 970 (1979) .44
Munson v State, 758 P2d 324 (Oka Crim 1988). 41
Neville v Butler, 867 F2d 886 (CA5 1989) 42
North Carolina v Pearce, 395 US 711, 23 L Ed 2d 656, 89 S Ct 2072 (1969) . . . . .9,10 ,15,18
People v Anderson, 409 Mich 474, 295 NW2d 482 (1980). 13
People v Crawford, 187 Mich App 344, 467 NW2d 818 (1991). 13
People v Doolittle, 23 Cal App 3d 14, 99 Cal Rptr 810 (1972) 48,50
People v Garcia, 203 Mich App 420, 513 NW2d 425 (1994). 3,6,14
People v Garcia, 448 Mich 442, 531 NW2d 683 (1995). 2
People v Garcia, CA 94233 (Jan 19, 1988). 5

People v Garcia, CA 117306 (May 15, 1989) 6

People v Gonzalez, 197 Mich App 385, 496 NW2d 321 (1992) 13

People v Griffin, 58 Cal Rptr 459 (1967) 22,47,48,50

People v Jenkins, 395 Mich 440, 236 NW2d 503 (1975) 4

People v Langley, 187 Mich App 147, 466 NW2d 724 (1991) 16

People v Wiley, 169 Ill App 3d 140, 523 NE2d 1344 (1988) 25

Potts v State, 369 SE2d 746 (Ga 1988) 12,18,23

Richardson v United States, 468 US 317, 82 L Ed 2d 242, 104 S Ct 3081 (1984) 21,37,38,39

Sanders v State, 429 So2d 245 (Miss 1983) 51,52

Sekou v Blackburn, 796 F2d 108 (CA5 1986) 42,43

Staael v State, 697 P2d 1050 (Alaska App 1985) 21,22

State v Despenza, 38 Wash App 645, 689 P2d 87 (1984) 22

State v Dykstra 33 Wash App 648, 659 P2d 1137 (1993) 22

State v O'Kelley, 113 NM 25, 822 P2d 122 (1991) 25

State v Seagroves, 691 SW2d 537 (Tenn 1985) 22

Stone v Superior Court of San Diego County, 31 Cal 2d 503, 646 P2d 809 (1982) 11,22,46,47,50

Tibbs v Florida, 457 US 31, 72 L Ed 2d 652, 102 S Ct 2211 (1982) 15,16

Todd v State, 884 P2d 668 (Alaska App 1994) 41

United States v Bizzard, 615 F2d 1080 (CA5 1980) 17

United States v Coward, 669 F2d 180 (CA4 1982) 17

United States v DiFrancesco, 449 US 117, 66 L Ed 2d 328,101 S Ct 426 (1980) 13,17

United States v DeVincent, 632 F2d 155 (CA1 1980) 21

United States v Dray, 901 F2d 1132
(CA1 1990) 54,55
United States v Fitzpatrick, 581 F2d
1221 (CA5 1978). 17
United States v Gooday, 714 F2d 80
(CA9 1983) . . . . .12,18,19,20,21 ,22,38
United States v Lagerquist, 758 F2d
1279 (1985). 23
United States v Larkin, 605 F2d 1360
(CA5 1979) 22
United States v Miller, 952 F2d 866
(CA5 1992) 37,39
United States v Porter, 807 F2d 21
(CA1 1986) 39
United States v Scott, 437 US 82,
57 L Ed 2d 65, 98 S Ct 2187 (1978) .24
United States v Stevens, 38 F3d 169
(1994) 39
United States v Reed, 617 F Supp 792
(Md, 1985) 25,26
**United States ex rel Jackson v
Follette**, 462 F2d 1041 (CA1 1984). .36

Other authorities

28 U.S.C. 1257(3). 2

MCL 750.317; MSA 28.549. 14

MCL 750.227b; MSA 28.424(2). 14

The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences, Peter Weston,
78 Mich L Rev. 1001 (1980) 10

Twice in Jeopardy, 75 Yale L.J., 262,
265-266 (1965) 10

W.R. LaFave & F.H. Israel, Criminal
Procedure, sec. 24.4 16

IN THE
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Petition for a Writ of Certiorari
to the Supreme Court of the
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Now comes the State of Michigan, by Randy O. Colbry, Prosecuting Attorney in and for the County of Shiawassee, and prays that a writ of certiorari will issue to review the judgment of the Supreme Court of the State of Michigan filed on April 18, 1995, rehearing denied, May 30, 1995, which upheld a Michigan Court of Appeals decision reversing respondent's conviction for the crime of armed robbery on double jeopardy grounds.

[Citations to opinions below]

The decision of the Michigan Supreme Court was entered April 18, 1995 and is reported as **People v Garcia**, 448 Mich 442; 531 NW2d 683 (1995). In an equal division opinion, the Court affirmed the decision of the Michigan Court of Appeals filed February 7, 1994, in **People v Garcia**, 203 Mich App 420; 513 NW2d 425 (1994). Copies of the opinions are included in the appendix to this petition. [App 1a-69a]

[Jurisdiction]

The decision of the Michigan Supreme Court was filed April 18, 1995. [App 9a-69a] A petition for rehearing filed by the people of the state of Michigan was denied May 30, 1995. [App 70a] The jurisdiction of this Honorable Court is invoked under authority of 28 U.S.C. sec. 1257(3).

[Constitutional provision involved]

Constitution of the United States, Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

[Statement of facts]

The facts, as far as they are pertinent to this petition for certiorari, are set forth by the Michigan Court of Appeals in **People v Garcia**, 203 Mich App 420; 513 NW2d 424 (1994) as follows:

"This case has a long history. In 1985, while stealing a car, defendant, Frank Garcia, and his codefendant, Ronald Hammond, killed the owner. [Timothy Roger Kiley] An information was filed charging defendant with one count of felony murder, an alternative count of open murder, and one count of felony firearm. A jury trial was held. The alternative count of open murder was dismissed by the trial court and the jury was instructed on two counts: the first, felony murder, including lesser included offenses of second-degree murder pursuant to **People v Jenkins**, 395 Mich 440; 236 NW2d 503 (1975), **reh den** 396 Mich 977 (1976), and armed robbery, and a second count of felony firearm. The jury returned verdicts of guilty of second-degree murder and felony firearm, and defendant was sentenced to life imprisonment. Subsequently, this Court reversed defendant's convictions because the jury instructions and verdict form did not contain a general verdict of 'not guilty.'" **People v Garcia**, unpublished per curiam opinion of the Court of Appeals (Docket Nos. 94233 and 94822, released 01-19-88), [App 3a]

On remand, an information was filed charging defendant with three counts: 1) second-degree murder, 2) armed robbery, and 3) felony-firearm. Defendant moved to quash the armed robbery count, arguing that he was placed in jeopardy of an armed robbery conviction by being tried for felony murder and his implied acquittal of felony murder served to bar retrial on the armed robbery charge. The trial court granted defendant's motion to quash, but an interlocutory appeal by the prosecutor was granted. A panel of this Court reversed the order quashing the armed robbery count, stating that its prior opinion in this matter did "not preclude a new trial on the added count of armed robbery." **People v Garcia,** CA 117306 (May 15, 1989) [App 11a]

Following a second jury trial on the charges for second-degree murder, armed robbery, and felony-firearm, the jury returned verdicts of not guilty of second-degree murder and felony-firearm, and guilty of armed robbery. Defendant was again sentenced to life imprisonment. We vacate the conviction." [App 3a-4a]

The Michigan Court of Appeals reversed by holding that the first jury's failure to convict of first degree felony murder, together with the conviction of second-degree murder, necessarily established that the defendant was not guilty of the lesser-included offense of armed robbery. **People v Garcia,** 203 Mich App 420; 513 NW2d 425 (1994) [App 4a-8a]

Petitioner was granted leave to appeal by the Michigan Supreme Court and argued that respondent's armed robbery conviction was not barred by the double jeopardy clause. An equal division opinion by the

Michigan Supreme Court resulted in the affirmance of the Court of Appeals decision vacating defendant's armed robbery conviction on double jeopardy grounds.

Justice Riley, joined by Justices Boyle and Mallett, writing for reversal, held that the defendant's implicit acquittal of first degree murder did not operate as an implied acquittal of the predicate offense of armed robbery. Accordingly defendant was properly retried and convicted of armed robbery. [App 11a-33a]

Justice Cavanagh, joined by Justice Levin, writing for affirmance, stated that the collateral estoppel doctrine and same-transaction test barred defendant's retrial for armed robbery and affirmed the result reached by the Court of Appeals. [App 34a-63a] Chief Justice Brickley, joined by Justices Cavanagh and Levin, writing for affirmance, stated that the doctrine of collateral estoppel is fully applicable to this case and requires reversal of defendant's armed robbery conviction. [App 63a-69a]

[Reasons for granting the Writ]

The double jeopardy clause of the Fifth Amendment is applied to the states through the general provisions of the Fourteenth Amendment. **Benton v Maryland**, 395 US 784, 794-796, 23 L Ed 2d 707, 89 S Ct 2956 (1969). Accordingly, the minimum standards of double jeopardy protection for criminal defendants, as enunciated by numerous United States Supreme Court decisions, are binding on the Michigan Supreme Court. The Michigan Supreme Court of course is free to delineate a higher level of protection under Michigan Constitution 1963, art I, sec 15, but did not do so in this case. Accordingly, the question of whether a conviction should be treated as an implied acquittal for purposes of the double jeopardy clause of the Fifth Amendment of the United States Constitution is a question of federal, not state law. **Kennedy v Washington**, 986 F2d 1129, 1134 (CA7 1993), cert den ___US___, 127 L Ed 2d 73, ___S Ct___ (1994).

Prior to and since the publication of Anno: Conviction of Lesser Offense as Bar, 61 ALR 2d 1141 in 1958 and the decision in **Green v United States**, 355 US 184, 2 L Ed 2d 199, 78 S Ct 221 (1957) numerous Courts have decided the question of whether a conviction of a lesser offense included in the greater one charged against the defendant bars prosecution for the greater offense on a new trial obtained at the defendant's instance. The question to be decided in the case **sub judice**, while variously decided by some state and federal courts, has not been directly decided by the United States Supreme Court.

The Michigan Court of Appeals and the Michigan Supreme Court have both stated that the issue presented in this case is matter of first impression in Michigan. [203 Mich App at p 423; App 4a 448 Mich at p 466, App 33a].

In **North Carolina v Pearce**, 395 US 711, 717, 23 L Ed 2d 656, 89 S Ct 2072 (1969) the Court, relying on an analysis

Note, Twice in Jeopardy, 75 Yale L.J., 262, 265-266 (1965) said:

> [T]he Fifth Amendment guarantee against double jeopardy ... has been said to consist of three separate constitutional protections. [1] It protects against a second prosecution for the same offense after acquittal. [2] It protects against a second prosecution for the same offense after conviction. [3] And it protections against multiple punishment for the same offense.

In **The Three Faces of Double Jeopardy: Reflections on Government Appeals of Criminal Sentences**, 78 Mich L Rev. 1001 (1980), author Peter Weston maintains that the most serious problem is with the first of the three rules--the prohibition on a retrial following an acquittal. He opines that the Court experiences more "confusion," overrules more prior decisions, and faces more unresolved issues in the field of acquittals than in any other area of double jeopardy. [pp 1065, 1066]

The California Supreme Court has stated that the decisions throughout the country are in disarray on the issue of giving effect to implied partial verdicts of acquittal on a charged offense where the jury is deadlocked as to an uncharged lesser included offense. See **Stone v Superior Court of San Diego County**, 31 Cal 2d 503, 646 P2d 809 (1982). In **Mauk v State**, 91 Md App 456, 605 A2d 157, 168 (Md 1992) the Court, in attempting to conceptualize a retrial following certain legal events, such as 1) appellate reversal of an earlier conviction, 2) the granting of a new trial by a trial judge following a conviction, or 3) the declaration of a mistrial, said the perplexing philosophical problem has bedeviled the United States Supreme Court for nearly seven decades.

The Michigan Court of Appeals and the Michigan Supreme Court equal division opinion, per Justices Cavanagh and Levin, JJ., and Brickley, CJ., for affirmance have decided a federal question and interpret the Fifth Amendment in a way that is in conflict with decisions of state and federal courts of appeal and

this Court. [App 4a-7a; 34a-69a] See e.g., **Potts v State**, 258 Ga 430, 369 SE2d 746 (1988); **Johnson v Commonwealth**, 221 Va 736, 273 SE2d 784 (1981); **Edmonds v United States**, 106 US App DC 373, 273 F2d 108 (1959), cert den 362 US 977, 4 L Ed 2d 1012, 85 S Ct 1062 (1960); **United States v Gooday**, 714 F2d 80 (CA9 1983), cert den 468 US 1217, 82 L Ed 2d 884, 104 S Ct 3587 (1984); **Cichos v Indiana**, 385 US 76, 17 L Ed 2d 175, 87 S Ct 271 (1966).

Petitioner further maintains that the respective opinions of the Michigan Court of Appeals and Michigan Supreme Court [per Cavanagh and Levin, JJ., and Brickley, C.J., for affirmance of the Court of Appeals reversal of respondent's armed robbery conviction, **supra**] have expanded the double jeopardy clause of the Fifth Amendment beyond any decision of the United States Supreme Court.

Accordingly, petitioner maintains that the issue is ripe for review, for as recently stated by this Court in **Anderson v Green**, 513 US___, 130 L Ed 2d 1050, 1053, ___S Ct___ (1995) "ripeness is peculiarly a question of timing," and "it is the situation now rather than the situation at the time of the [decision under review] that must govern."

As stated above double jeopardy engenders three basic protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a second prosecution for the same offense after conviction; and, (3) it protects against multiple punishments for the same offense. See **People v Gonzalez**, 197 Mich App 385, 496 NW2d 321 (1992), **lv den** 442 Mich 920; **People v Crawford**, 187 Mich App 344, 467 NW2d 818 (1991); **People v Anderson**, 409 Mich 474, 295 NW2d 482 (1980).

It is the scope of the first protection that is implicated in the case at bench. The scope is said to be broad and its proscription absolute. See generally **United States v DiFrancesco**, 449 US 117, 66 L Ed 2d 326, 101 S Ct 426 (1980). The reasons are stated thusly:

> The underlying idea, one that is deeply ingrained in at least the Anglo American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. [**Green v United States**, 355 US 184, 187-188 (1957)]

At his first trial which concluded on April 7, 1986 respondent Garcia, although charged with first-degree felony murder, [murder committed during the perpetration of an armed robbery] was jury-convicted of second degree murder, MCL 750.317; MSA 28.549 and felony firearm, MCL 750.227b; MSA 28.424(2). Respondent's first appeal of right to the Court of Appeals resulted in reversal based on the procedural failure of the trial court to permit the jury to return a general verdict of not guilty on Count I, felony murder. [**People v Garcia**, 203 Mich App 420, 513 NW2d 425 (1994); App 3a]

Petitioner maintains that reversal of respondent's armed robbery conviction obtained at the retrial is inconsistent with the better reasoned cases holding that implied acquittal does not necessarily preclude a retrial on a lesser included offense where the jury was not given a full opportunity to make that decision.

In a long line of cases commencing with **Ball v United States**, 163 US 662, 672, 41 L Ed 300, 16 S Ct 1192 (1896), the United States Supreme Court has held that the constitutional guarantee against double jeopardy imposes no limitation whatever upon the power of the court to retry a defendant who has succeeded in having his first conviction set aside. The Supreme Court has adhered to this doctrine in more recent cases. See e.g., **Tibbs v Florida**, 457 US 31, 40, 72 L Ed 2d 652, 102 S Ct 2211 (1982) quoting **North Carolina v Pearce, supra**. See also **Addison v Parratt**, 208 Neb 459, 303 NW2d 785, 787 (1981) and citations.

In **Montana v Hall**, 481 US 400, 403, 95 L Ed 2d 354, 107 S Ct 1825 (1982) the Court in its per curiam opinion said:

> It is a "venerable principl[e] of double jeopardy jurisprudence " that "[t]he successful appeal of a judgment of conviction, on any ground other than the insufficiency of the evidence to support the verdict, [citation] poses no bar to further prosecution on the same charge." [Citation} See generally 3 W. LaFave & Isreal,, Criminal Law Procedure sec. 24.4 (1984)...

Stated another way, the appellate success of a defendant does not equal acquittal, except where the evidence is held legally insufficient to have supported the conviction in the trial court. See **Burks v United States**, 437 US 1, 57 L Ed 2d 1, 98 S Ct 2141 (1978); **People v Langley**, 187 Mich App 147, 150, 466 NW2d 724 (1991).

Even this standard is less than clear: double jeopardy does not bar a re-trial where a guilty verdict is held, by a trial judge or appellate court to be "against the weight of the evidence." **Tibbs v Florida, supra** 457 US at pp 42-44, 72 L Ed 2d 652, 102 S Ct 2211.

In **United States v Bizzard**, 615 F2d 1080 (CA5 1980), cert den 459 US 973, 74 L Ed 2d 286, 103 S Ct 305 (1982), the defendant could be retried without violation of the double jeopardy clause of the Fifth Amendment where the appellate court reversed on an issue of trial error.

In **United States v Coward**, 669 F2d 180 (CA4 1982), cert den 456 US 946, 72 L Ed 2d 470, 102 S Ct 2014 (1982), the Court held that the double jeopardy clause did not preclude retrial of one defendant where the prior reversal was due to the trial judge's failure to order a separate trial for codefendants.

In **United States v Fitzpatrick**, 581 F2d 1221, 1224, n. 4 (CA5 1978), it was said that where there is a reversal on an issue of trial error, the defendant may be retried without violation of the double jeopardy clause.

In **United States v DiFrancesco**, 449 US 117, 131, 66 L Ed 2d 328, 101 S Ct 426, 66 L Ed 2d 328 (1980), this Court said:

> Finally, if the first trial has ended in a conviction, the double jeopardy guarantee "imposes no limitation whatever upon the power to **retry** a defendant who has succeeded in getting his first conviction set aside." (emphasis in original) **North Carolina v Pearce**, 395 US, at 720, 23 L Ed 656, 89 S Ct 2072. "It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to convictions." (citation omitted) "(T)o require a criminal defendant to stand trial again after he has successfully invoked a statutory right of appeal to upset his first conviction is not an act of governmental oppression of the sort against which the Double Jeopardy Clause was intended to protect." (Citation omitted)

In the case **sub judice**, the Justices for reversal and reinstatement of respondent's conviction, [Riley, Mallet and Boyle, JJ.] rely on some very formidable and well reasoned federal and state court decisions, e.g., **Edmonds v United States**, supra; **United States v Gooday**, 714 F2d 80 (CA9 1983); **Potts v State**, 369 SE2d 746 (1988); and **Johnson v Commonwealth of Virginia**, 273 SE2d 784 (1981). [App 18a-23a, 33a]

In **Edmonds v United States, supra**, the defendant had been found guilty of second degree murder as a lesser included offense under the indictment's first degree murder count. On appeal, the conviction was reversed and defendant retried for second degree murder under the first degree count. On his second appeal, Edmonds argued that the jury's second degree verdict was an implied acquittal on the indictment's first degree count under **Green v United States**, which thus made him immune from further prosecution for any offense included under the indictment's first degree charge. The argument was rejected on appeal where it was held that **Green** did not bar, on double jeopardy grounds, a new trial under the indictment for second degree murder even though Edmonds could not be retried on the greater first degree count specified in the indictment.

In **United States v Gooday, supra**, the Court found that the **Edmonds** case correctly interpreted **Green** as granting independent force to lesser included offenses on which a jury has been instructed under one count of the indictment. It was thus held that an acquittal on the indictment's first degree murder count did not preclude retrial on three lesser included offenses on which the jury was deadlocked.

In **Johnson v Commonwealth of Virginia, supra**, the defendant's capital murder conviction was reversed for instructional error. Although he had been found not guilty of robbery, the Court rejected his double jeopardy argument. There it was held that the jury did not resolve the issue of the defendant's guilt of armed robbery. The Court said that it "would stultify itself to hold that the jury in this case made a factual finding that Johnson was innocent of robbery. We would have to find that it ignored the court's instruction and that its finding of not guilty under Count I was completely unrelated to the express direction it had received from the court to return such a verdict if it found defendant guilty of capital murder." See App 19a-20a, fn 16]

In **Staael v State**, 697 P2d 1050 (Alaska App 1985) the Court said that while there is authority for the proposition that one acquitted of a greater offense cannot be separately tried for a lesser-included offense, it is well established that a defendant may be retried when a hung jury results in a mistrial, citing **Richardson v United States**, 468 US 317, 82 L Ed 2d 242, 104 S Ct 3081 (1984). The Court further states that whether acquittal of a greater offense and a hung jury on a lesser-included offense precludes retrial of the lesser offense has led to a split of authority, but concluded that the better reasoned cases, which constitute the majority of those considering the issue, hold that retrial on a lesser offense is not barred, citing **United States v Gooday, supra; United States v DeVincent**, 632 F2d 155 (CA1 1980); **Forsberg v United States**, 351 F2d 242 (CA9 1965), cert den 383 US

950, 16 L Ed 2d 212, 86 S Ct 1209 (1966); **Stone v Superior Court, supra; United States v Larkin,** 605 F2d 1360 (CA5 1979), modified on reh, 611 F2d 585 (1980), cert den 446 US 936, 64 L Ed 2d 793, 100 S Ct 2160 (1980); and **Edmonds v United States.** [**Staael v State**, 697 P2d at p 1055, fn 2.]

In **State v Seagroves,** 691 SW2d 537 (Tenn 1985) the Tennessee Supreme Court, adopting the rationale of **Gooday, supra,** held that the double jeopardy clause did not preclude a retrial of defendant after a mistrial was declared at an earlier trial where the jury could not reach a verdict on lesser offenses included in the crime for which defendant was indicted. See also **State v Despenza,** 38 Wash App 645, 689 P2d 87, 93 (1984) where the Court said that it could not imply from the failure to reach a verdict that the jury acquitted the defendant of the greater offense, citing **People v Griffin,** 58 Cal Rptr 459 (1967); **State v Dykstra**, 33 Wash App 648, 656 P2d 1137 (1984).

In **Potts v State, supra,** 369 SE2d at 747, the defendant claimed that under the Green-Price rule his jury impliedly acquitted him of the greater crime of kidnapping with bodily injury by convicting him of the lesser offense of kidnapping. The Court rejected the argument on two grounds:

> . . . One reason is that an unambiguous conviction of a lesser-included offense is a necessary predicate for application of the **Green-Price** rule. In **Potts v Zant, supra,** 734 F2d at 530 the Court of Appeals for the Eleventh Circuit concluded that the verdict on Count Three was ambiguous. Our review of the record of Pott's trial likewise leads us to conclude that the verdict on Count Three was ambiguous.
>
> Our second reason is that the **Green-Price** rule does not apply unless the trial court gives the jury a full opportunity to return a verdict on the greater charge. The record of Pott's trial shows that the court did not give the jury a full opportunity to convict Potts of kidnapping with bodily injury.

cf., also **United States v Lagerquist,** 758 F2d 1279 (CA8 1985) where the Court held that a prior appellate court reversal of a conviction on a jurisdictional ground which did not reach the merits, and not in the nature of an acquittal--held Double Jeopardy inapplicable.

The term "acquitted" or an "acquittal" is used in criminal law in contexts indicating a decision on the merits by a fact finder following the attachment of jeopardy. Gikas v Zolin, 863 P2d 745 (Cal 1993). In United States v Scott, 437 US 82, 57 L Ed 2d 65, 98 S Ct 2187 (1978) it was said:

> "the term 'acquittal,' . . . generally refers to a disposition based upon a determination of the merits. [Fn. omitted.] '[A] defendant is acquitted only when "the ruling of a judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the actual elements of the offense charged." [Citation]' [defining the term in the context of double jeopardy.]

With respect to the concept of "implied acquittal" it is said that it results from a ruling which resolves in the defendant's favor some or all of the required elements of the offense. Moreover, an implied acquittal barring re-prosecution must necessarily entail a determination that one of the offenses charged was the lesser included offense of the other. And it is only where the jury is given the full **opportunity** to return a verdict either on the greater or, alternatively, on the lesser included offense does the doctrine of implied acquittal obtain. See **United States v Reed**, 617 F Supp 792, 800 (Md 1985).

In **People v Wiley**, 169 Ill App 3d 140, 523 NE2d 1344, 1346 (1988) the Court said that an erroneous ruling of law where the trial court does not rule on the sufficiency of the evidence does not constitute an implied acquittal.

In **State v O'Kelley**, 113 NM 25, 822 P2d 122 (1991) the defendant claimed that his conviction for DUIL constituted an "implied acquittal" of vehicular homicide. In rejecting the argument the court said that an implied acquittal generally occurs when the jury is instructed to choose between a greater and a lesser offense, and chooses the lesser. The Court observed that in this situation the great majority of cases in this country have regarded the jury's verdict as an "implicit acquittal" of the greater offense citing **Green v United States, supra**. The Court declared however, that it is only where the jury is given the **full opportunity** to return a verdict either on the greater or alternatively on the lesser offense that the doctrine of implied acquittal has application, citing **United States v Reed, supra**.

In **Commonwealth v Tabb**, 491 Pa 372, 421 A2d 183 (1980), cert den 450 US 1000, 68 L Ed 2d 202, 101 S Ct 1708 and **Commonwealth v Klobuchir**, 486 Pa 241, 405 A2d 881 (1979), cert den 445 US 952, 63 L Ed 2d 787, 100 S Ct 1602 (1980) the Pennsylvania Supreme Court said that "the sine qua non for finding implicit acquittal is a failure to convict in the face of **full opportunity** for conviction." [emphasis added] In **Commonwealth v Ward**, 493 Pa 115, 425 A2d 401 (1981), cert den 451 US 974, 68 L Ed 2d 354, 101 S Ct 2055, the Court said this result is based on the unequivocal language in **Green** revealing quite clearly why the United States Supreme Court concluded that an implicit acquittal had occurred:

> Green was in **direct peril** of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder, it chose the latter. In this situation, the great majority of cases in this country have regarded the jury's verdict as an implicit acquittal on the charge of first degree murder...
>
> (The jury) was given a full **opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from** doing so. Therefore, it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged. (Emphasis supplied).

Petitioner respectfully submits that in the case **sub judice**, the Justices for reversal and reinstatement of defendant's conviction [Riley, Mallett and Boyle, JJ.], [App 11a-33a] were correct in their analysis and conclusion that the implied acquittal aspect of the double jeopardy clause did not prohibit the reprosecution of defendant for the crime of armed robbery. That is, the double jeopardy clause is not implicated where, in a case such as this, the jury was not afforded a **full opportunity** to convict defendant of armed robbery, and further, that the jury's verdict "is inherently ambiguous, given the fact that it was allowed to return only one verdict." [App 33a]

To this petitioner would add, that where the trial court's jury instructions and the verdict form did not permit the finding of a general not guilty verdict on Court I, coupled with the written directive on the verdict form that they could choose only one verdict, such limiting instruction constitutes an "extraordinary circumstance" contemplated by the Court **Green** as preventing the jury from having a full opportunity to render a verdict as to each count.

Chief Justice Brickley, in his concurring opinion to affirm the reversal of respondent's conviction, [App 63a-69a] sets forth a scholarly discussion concerning the applicability of collateral estoppel. In particular the discussion involves the presumption of a rational jury. Petitioner maintains that the discussion is too limited and that when the rational jury concept is properly considered and applied, it too is supportive of the position of the petitioner.

In **Ashe v Swenson**, 397 US 436, 25 L Ed 2d 469, 90 S Ct 1189 (1970) the question before the Court was "Whether, after a jury determined by its verdict that the petitioner was not one of the robbers, the State could constitutionally hale him before a new jury to litigate that issue again." This Court held that it could not. In explaining its decision and its application of the double jeopardy clause, **Ashe** emphasized that the verdict at the first trial should be viewed "with realism and rationality". **Ashe v Swenson**, 397 US at 444, 25 L Ed 2d 469, 90 S Ct 1189.

It is important to observe that in **Ashe**, the jury at the first trial did not render just a general verdict of not guilty, but rather, although not required to do so, returned a verdict of "**not guilty due to insufficient evidence.**" In the case **sub judice**, by contrast, the jury returned a verdict of second degree murder. [emphasis added]

Ashe informs us that, by a study of the issues presented to the jury at the first trial, what was decided may rationally be determined. Thus, the "rational jury" test:

> Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue **other** than that which the defendant seeks to foreclose from consideration. [397 US at 444, 25 L Ed 2d 469, 90 S Ct 1189]

Petitioner maintains that under the rational jury approach the respondent's armed robbery conviction at the retrial should have been reinstated by the Michigan Supreme Court. As stated above, what a rational jury could and could not have decided is determined by an examination of what was presented to the jury, what was argued to it. In order to do justice in the case at bench it is obligatory that the Court consider the effect of the trial court's limiting instructions concerning possible verdicts. Petitioner, for its part, maintains that an intellectually honest appraisal thereof should compel a finding that the only **rational** explanation for the second degree murder verdict at respondent's first trial is that the jury, on due consideration of the evidence, the defensive posture assumed by respondent, [i.e., defendant was tried on an aiding and abetting theory, using duress as his defense (see App 19a)] and adherence to the instructions of the trial court, entered only one verdict. In this case the jury was specifically instructed "1st Degree Felony Murder, Possible Verdicts, **You may**

return only one verdict on this charge. Mark only one box for this count." [App 12a, 34a] [Emphasis added]

Presuming that the Shiawassee County jury in this case was a rational jury, then it is said that the usual assumption is that the jury follows the instructions of the court. **Kennedy v Washington, supra** 986 F2d at 1132. Accordingly, it must be presumed that the jury in the case **sub judice** rendered its verdict of second degree murder in accord with the trial court's specific and limiting instructions. The jury, in accord with these instructions, as with the voting process in our election culture, did not want to spoil its ballot. For example, in the election process, voters are often instructed on the ballot that they are to vote for one candidate or one proposal only, lest their ballot be spoiled and not counted. Thus, the verdict of second degree murder in the case **sub judice**, answers the question posed in **Ashe**. Petitioner submits that since **Ashe** mandates that the Court consider only what the jury may have rationally done, it may be fairly concluded that no determination was made as to the charge of armed robbery at respondent's first trial. Thus respondent was not impliedly acquitted of armed robbery.

No one should gainsay that the Justices for affirmance [Cavanagh and Levin, JJ., and Brickley, C.J.] set forth very compelling arguments for their respective positions. [App 34a-69a] Petitioner maintains however, that when contrasted with the better reasoned decisions on the subject, this Court should be persuaded to find that respondent Garcia's retrial and armed robbery conviction is not barred on double jeopardy grounds.

Petitioner's position finds further support in other cases not cited in the Michigan Court of Appeals or Michigan Supreme Court opinions. For example, in **Commonwealth v Nardone**, 406 Mass 123, 546 NE2d 359 (1989) the Court rejected the defendant's double jeopardy argument. The Court points out that normally, the law treats a jury's decision to convict of a lesser-included offense as an implied acquittal on the offense charged. Further, even though retrial of a defendant whose conviction is reversed is not barred, [citing J.R. Nolan, Criminal Law, sec. 692] a defendant convicted of a lesser-included offense normally cannot be retried on the greater offense initially charged. The Court said in particular:

> . . . Where a defendant attacks the very error that resulted in his conviction on the lesser offense rather than the main offense, we hold that retrial on the main offense is not barred. In this respect, this case is the same as the situation in which a conviction is reversed because of an improper jury instruction on the elements of an offense but retrial on that offense is nevertheless permitted.
> [**Commonwealth v Nardone**, 546 NE2d at p 366]

The Court explains that this Court's holding in **United States v Green** is not to the contrary.

> . . . In Green, where the defendant had been charged with first degree murder and convicted of second degree murder (with the

> jury remaining silent on first degree murder), the Court held that retrial for first degree murder was barred by double jeopardy. This ruling was based in part, however, on the rationale that a conviction on a lesser offense necessarily implies acquittal on the main offense charged. id. at 190, 78 78 S Ct at 225. For the reasons stated above, we find this reasoning inapplicable on the present facts. [**Commonwealth v Nardone**, 546 NE2d at p 366]

The Court in **Nardone** also found that decisions subsequent to **Green** establish that failure by a jury to return a verdict on an offense charged does not invariably bar retrial for that offense, citing **Cichos v Indiana**, supra. In **Cichos** the defendant was charged with both involuntary manslaughter and reckless homicide, two offenses having essentially the same elements, but substantially differing penalties under state law. The defendant was initially convicted of the less serious crime of reckless homicide, [with the jury remaining silent on involuntary manslaughter], but his conviction was reversed on appeal and he was retried on both of the original charges. In that setting the Supreme Court agreed with the Supreme Court of Indiana that the defendant's retrial had not been barred by double jeopardy because "a verdict of guilty of reckless homicide [did] not logically exclude the possibility of such a verdict on the charge of involuntary manslaughter, quoting **Chicos v State**, 246 Ind 680, 208 NE2d 685, 688 (1965) and **United States ex rel Jackson v Follette**, 462 F2d 1041 (CA2) and W.R. LaFave & F.H. Israel, Criminal Procedure, sec. 24.4 (1984) (stating that the **Green** rule is not applicable in all instances in which a jury does not return a verdict on some count.) [**Commonwealth v Nardone**, 546 NE2d at p 366]

In fn 7 the Court is careful to explain that technically the result in **Cichos** was the dismissal of the writ of certiorari as improvidently granted. Apparently, the Court granted certiorari to consider whether the double jeopardy clause should be incorporated through the Fourteenth Amendment against the States.

Since the Court concluded that retrial did not violate Green, the case did not raise the issue of incorporation of the double jeopardy clause.

In **United States v Miller**, 952 F2d 866 (CA5 1992), cert den,___US___, 120 L Ed 2d 900, 112 S Ct 3029 (1992) it was said that where the Court does not make findings as to the sufficiency of evidence, its decision does not raise a double jeopardy bar to a retrial:

> ... As this Court foreshadowed in the first appeal, both of these grounds for reversal are mere trial errors for which double jeopardy principles do not preclude retrial: "Since reversal is based on defects in the indictment and jury instructions rather than on insufficiency of the evidence, there is no apparent obstacle to retrial should the government seek a new indictment." 841 F2d at 112. The Supreme Court has so held specifically with respect to defects in the charging instrument in **Montana v Hall** [cit. om.] and **United States v Ball**, [cit. om.] and with respect to jury instructions in **Forman v United States**, [cit. om] cited in **Tateo**, 84 S Ct at 1589.

The Court also discusses **Richardson v United States**, 468 US 317, 82 L Ed 2d 242, 104 S Ct 317 (1984) where the Supreme

Court held that "the protection of the Double Jeopardy Clause by its terms applies only if there has been some event, such as an acquittal, which terminates the original jeopardy, [citations omitted.] The Court further explains:

> ... We recognized that **Richardson** was an appeal asserting a double jeopardy claim which followed a mistrial, but its holding is clearly not limited to such cases. It refuses to extend **Burks** beyond instances in which the appellate court in fact reversed for insufficient evidence. As the Court explained: "Our holding in **Burks** established only that an appellate court's finding of insufficient evidence to convict on appeal from a judgment of conviction is for double jeopardy purposes, the equivalent of an acquittal ...." [cit. om.] The central concept of **Richardson** is that there is no **double** jeopardy unless the original jeopardy has **terminated**; and it is abundantly clear that a reversal for instructional error is no more than a termination of jeopardy than a mistrial where the jury is unable to agree. And it is evident that the implications of **Richardson** for a case such as this one did not escape the attention of the **Richardson** court. Indeed, Justice Brennan in dissent complained of the Court's narrow reading of **Burks**: "Apparently, under the Court's approach, only an actual judgment of acquittal, or an unreversed conviction, would 'terminate' jeopardy and thereby bar retrial. (Brennan, J.,

> dissenting). He further complained that the Court's holding in **Burks** could be undermined by appellate court refusals to rule on insufficiency of the evidence claims and instead reversing on other grounds. Id., at 3089. [**United States v Miller**, 952 F2d at pp 870-872]

Following **Richardson**, the Court held that double jeopardy did not bar the retrial, and because under **Richardson** jeopardy has not terminated, double jeopardy will not be available as a ground for challenging any subsequent conviction that may result. The Court also noted that its holding in this respect is supported by **United States v Porter**, 807 F2d 21 (CA1 1986). [**United States v Miller**, 952 F2d at p 874]

cf., also **United States v Stevens**, 38 F3d 167, 170 (CA5 1994) where the Court said that because we make no finding as to the sufficiency of the evidence, our decision does not raise a double jeopardy bar to defendant's retrial, citing **United States v Miller, supra**.

Petitioner maintains that where the respondent's conviction is reversed because of instructional error the principles of double jeopardy do not bar his reprosecution at a duly granted retrial for the offense of armed robbery.

The Michigan Supreme Court correctly observes that the charges in the instant case were based on a 1985 carjacking and fatal shooting and the the prosecution's theory was that during the carjacking the two defendants abducted victim Kiley. When Kiley refused to get into the trunk Hammond shot and killed him. [App 12a, 35a]

Justice Cavanagh, as alternative grounds for upholding the Court of Appeals reversal of the armed robbery conviction, discusses the doctrine of collateral estoppel and the multiple punishment strand of double jeopardy, relying on **Harris v Oklahoma**, 433 US 682, 53 L Ed 2d 1054, 97 S Ct 2912 (1977) and other cases. He argues that respondent's conviction for robbery at the second trial was based on essentially the same facts as presented at the first trial. [App 53a-5a]

In response thereto, petitioner submits that the Court erroneously construes **Harris** (a successive prosecution case) to flatly prohibit cummulative punishment for both felony murder and the underlying felony, even when the convictions and sentences arise from a single trial. See **Todd v State**, 884 P2d 668, 678. fn 8 (Alaska App 1994) discussing **Munson v State**, 758 P2d 324, 332 (Okl Crim 1988), cert den 488 US 1019, 102 L Ed 2d 809, 109 S Ct 820 (1989).

While it appears that the rule emerging from **Harris** and its progeny is that the double jeopardy clause bars prosecution for both felony murder and the underlying felony, this Court in **Illinois v Vitale**, 477 US 410, 65 L Ed 2d 228, 100 S Ct 2260 (1980) elaborated on its holding in **Harris** stating that "for the purposes of the Double Jeopardy Clause, we did not consider the crime generally described as felony murder as a separate offense distinct from its various elements. Rather, we treated a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense." **Id.** at 420

Cases decided subsequent to **Vitale** have held that convictions of both felony murder and a felony arising out of the same occurrence need not be invalidated where it is shown that another separate felony could have served as the predicate offense underlying the felony murder charge. For example in **Sekou v Blackburn**, 796 F2d 108 (CA5 1986) it was held that there would be no double jeopardy violation where the defendant was found guilty of armed robbery at trial and later pleaded guilty to felony murder "if the state could have proved felony-murder without also proving armed robbery." [p 111] It was apparent from the facts in **Sekou** that the state could have proved kidnapping as an alternative underlying felony. **Id.** n. 3. See also **Neville v Butler**, 867 F2d 886 (CA5 1989).

In the case **sub judice**, although not charged, it appears from the record and the discussion of the Michigan Supreme Court that the prosecution could have proved kidnapping [i.e., the abduction of victim Kiley, (App 35a)] as an alternative underlying felony as in the **Sekou** decision. Petitioner submits that in light of **Vitale** and **Sekou** the Court's reliance on **Harris v Oklahoma** as an alternative ground for affirmance of the reversal respondent's robbery conviction is substantially undermined. Accordingly such argument is not an acceptable basis for the vacatur of respondent's conviction.

While the Justices for affirmance have presented scholarly discussions concerning the applicability of collateral estoppel to the case **sub judice**, [App 34a-69a] petitioner respectfully submits that further consideration of this concept is necessary.

Ashe v Swenson, supra, holds explicitly that collateral estoppel is a part of the constitutional protection against double jeopardy--an unsurprising conclusion since double jeopardy is the criminal counterpart of the civil doctrine of res judicata, of which the principle of collateral estoppel is a part. See **Kennedy v Washington, supra; Dowling v United States**, 493 US 342, 347, 107 L Ed 2d 708, 110 S Ct 668 (1990).

In **Kennedy, supra**, the Court informs us that "Collateral estoppel (issue preclusion) has never been as rigid as res judicata is in its sense as claim preclusion. A finding is entitled to collateral estoppel effect only if it is the product of a fair hearing." citing **Montana v United States**, 440 US 147, 164, n 11, 59 L Ed 2d 210, 99 S Ct 970 (1979); **Kairys v INS**, 981 F2d 937, 939-40 (CA7 1992), cert den ___US___, 123 L Ed 2d 460, 113 S Ct 1832 (1993). The Court also points out that an acquittal bars reprosecution, however deficient the procedure that resulted in the acquittal, citing **Fong Foo v United States**, 369 US

141, 7 L Ed 2d 629, 82 S Ct 671 (1962) (per curiam). The Court then states:

> But that illustrates the res judicata component of double jeopardy, not the collateral estoppel component--and acquittals, as we have pointed out, have no collateral estoppel effect. Implied acquittals can have such an effect, but only because an implied acquittal is an express conviction, and a conviction implies the jury found certain facts to have been proved beyond a reasonable doubt. [**Kennedy v Washington**, 986 F2d at p 1135]

In **Kennedy**, **surpa**, the Court held that retrial of the defendant for murder after the jury verdict convicting him of both murder and voluntary manslaughter had been reversed on appeal was not precluded by the collateral estoppel component of double jeopardy, absent an express or implicit finding that the defendant had been acting in sudden and intense passion as required for voluntary manslaughter under Illinois law.

The scholarly collateral estoppel discussion of Justice Cavanagh in the case at bar, [App 34a-54a] while undoubtedly persuasive, should not be dispositive of the double jeopardy issue in this case.

Justice Cavanagh's collateral estoppel argument sets forth various theories to support his conclusion that respondent's retrial for armed robbery was improper. He says that the jury either found that "at least one of the elements of armed robbery was not proven beyond a reasonable doubt" [App 52a], or, the first jury determined that all the elements of murder had been proven beyond a reasonable doubt when it convicted defendant of second degree murder and that "If the jury had also determined that the prosecutor had proven beyond a reasonable doubt that the defendant was guilty of armed robbery, it was **obligated** by the jury instructions to return a verdict of guilty of first degree murder. [52a]

The problem with Justice Cavanagh's argument is that there is no reliable basis in fact for his conclusion.

In **Stone v Superior Court of San Diego Co.**, 646 P2d 809 (1982) the Court cites three cases [**Griffin, Doolittle and Magee**] where the trial court was not given any indication of how the jurors stood until **after** the declaration of a mistrial and the jury discharged. In **People v Griffin**, 66 Cal 2d, 58 Cal Rptr 107, 426 P2d 507 (1967) the defendant was tried a second time on a charge of first degree murder, the first conviction of that charge having been reversed on appeal. When the jury at the second trial could not reach a verdict, the judge discharged them and declared a mistrial. The jury foreman then stated in open court that the jury had stood ten for acquittal and two for conviction of second degree murder. At the third trial, the defendant was convicted of first degree murder. On appeal from that conviction he claimed that the jury at the second trial had impliedly acquitted him of first degree murder. The California Court of Appeal rejected the claim of former acquittal reasoning that "We may not infer from the foreman's statement that the jury had unanimously agreed to acquit of first degree murder. There is no reliable basis in fact for such an implication, for the jurors had not completed their deliberations and those voting for second degree murder may have been temporarily compromising in an effort to reach unanimity."

In People v Doolittle, 23 Cal App 3d 14, 99 Cal Rptr 810 (1972) the defendant was on trial for murder. The jury was given the option of convicting him of the charged offense or one of the necessarily included offense or of acquitting him of all offenses. When the jury informed the Court that they could not reach a verdict within those options, the court declared a mistrial and set the case for retrial. Defendant thereafter filed a pretrial motion to enter a plea of once in jeopardy or former acquittal. In that case the jury foreman testified that on the jury's final vote, no juror had voted to convict of first degree murder. The Court of Appeals nevertheless held that no verdict had been reach in the first trial relying on the Griffin case: "The significant holding in **Griffin** is that the jury, as in the case here, had not completed its deliberations. In the instant case, as in **Griffin**, the ballots taken and voted upon may well have been the result of temporary compromises in an effort to reach unanimity."

In **Magee v Superior Court**, 34 Cal App 3d 201, 109 Cal Rptr 758 (1973) the jury at the defendant's first trial was given the options of acquitting him or of finding him guilty of either the charged offense of kidnapping for the purpose of extortion or of the uncharged lesser included offense of simple kidnapping. The jury was unable to reach a verdict within those options, and a mistrial declared. At the second trial the defendant asserted that the jury had functionally acquitted him of the greater charge. In support of the claim he offered an affidavit of the jury foreman to the effect that the jury had unanimously agreed that he was not guilty of violating sec. 209, yet was deadlocked on the lesser offense. The affidavit of another juror, however, stated that the jurors never voted or otherwise agreed that defendant should be found not guilty of the greater charge.

The Court in **Stone** points out that the primary concern of the **Griffin** court was to insure that a verdict represents the definite and final expression of the jury's intent with respect to the disposition of the factual issues presented by a particular case. The members of the jury in **Griffin** never gave any indication of a final intent to acquit the defendant of the murder charge, and the facts in **Doolittle** and **Magee** were similarly equivocal.

In **Griffin**, **Doolittle**, and **Magee** the respective double jeopardy contentions were rejected, notwithstanding the proffered defense affidavits cited above.

The petitioner submits where proffered affidavits concerning jury deliberations are found to be an unreliable basis for determining the legitimacy of a double jeopardy claim, it necessarily follows that a strained theoretical basis for application of the collateral estoppel doctrine as urged by Justice Cavanagh should likewise be rejected as a basis for prohibiting respondent Garcia's retrial.

The interpretive decisions indicate that there are other factors that must be considered before a court can prohibit a reprosecution based on collateral estoppel.

The Court in **Sanders v State**, 429 So2d 245 (Miss, 1983) points out that to some, collateral estoppel means issue preclusion: where an issue has been litigated in one trial, the losing party is precluded from relitigation. The Court states that if this were all collateral estoppel means, there would be no problem with the application of the doctrine in criminal cases. The Court explains that it may well be useful in analyzing some double jeopardy cases but that:

> **Ashe v Swenson** and progeny, however, construe collateral

> estoppel to mean much more. **Ashe** proceeds on the theory that the jury in the first trial had affirmatively found that Ashe had not been one of the robbers. [cit. om.] Seen in this light, there is a logical infirmity in application of the doctrine of collateral estoppel in criminal cases. That infirmity emerges when one takes seriously the beyond-a-reasonable doubt burden of proof imposed upon the prosecution.

The Court contrasts the collateral estoppel doctrine in the civil case setting stating that the notion works reasonably well where facts are established by a preponderance of the evidence, because their existence is by a factor of 51 to 49 more probable than not. The Court concludes however, that it doesn't work at all in criminal cases because by no stretch of the imagination can a not guilty verdict be said to establish affirmatively that the defendant was innocent of the crime. [429 So2d at pp 251-252]

As stated above, **Ashe** proceeds on the theory that the jury in the first trial had affirmatively found that he had not been one of the robbers. In Ashe the defendant's guilt turned on the issue of identity. The defense offered no testimony and waived final argument. The Court also points that "The jury--though not instructed to elaborate upon its verdict--found the petitioner '**not guilty due to insufficient evidence.**'" [Emphasis added] [See also App 23a]

In the case **sub judice** respondent Garcia, as noted above, was tried on the theory of aiding and abetting, using duress as his defense. [App 19a] Justice Cavanagh does not discuss this feature of the trial in his collateral estoppel analysis, [App 44a-54a] whereas, the Justices for reversal point out that the defensive posture of the respondent may have analytical significance to the extent that the jury verdict may be explained in terms of the exercise of lentity. Justice Cavanagh criticizes the discussion as "surmise", [App 61a] but ignores the fact that the Justices for a reversal said that possible explanations for the jury verdict of second degree murder, renders the verdict as being ambiguous. [App 19a]

In **Lett v State**, 727 SW 2d 367 (Tex App -- Fort Worth 1987) the Court said that collateral estoppel only arises when a prior judgment has resulted in an actual acquittal of the defendant.

In **United States v Dray**, 901 F2d 1132 (CA 1, 1990) the Court said collateral estoppel is applicable only as to those issues actually decided in the earlier case that are foreclosed from relitigation in a later case. The Court also said that "Where it is impossible to discern whether a particular issue was previously resolved in a defendant's favor, the preclusive effect must be denied." (citation omitted) [p 1136].

Based on the record in the instant case of respondent Garcia, your petitioner submits that, as powerful as the arguments of the affirming Michigan Supreme Court Justices may appear, they merely present the Court with a variety of plausible theories as to what ultimate factual issues were actually decided by the jury in the first trial. [App 34a-54a] The Court in **Dray**, **supra**, 901 F 2d at p 1140 in considering various plausible theories where collateral estoppel was sought to be invoked said:

> ... Gossamer strands of possibility and surmise are not the stuff of which the preclusory bar of criminal collateral estoppel may be fashioned. Sturdier threads are needed. On this gauzy record, Dray cannot meet his burden of demonstrating "that the issue whose relitigation he seeks to foreclose was **actually** decided in the first proceeding." (Court's emphasis) (citations omitted)

Justice Cavanagh in his opinion goes to great lengths to advance his collateral estoppel argument. [App 34a-54a] The problem with his argument, in light of **Dray**, is that he does not, and indeed cannot, demonstrate that the jury **actually** decided respondent's criminality on the lesser-included predicate armed robbery charge at the first trial. Accordingly, Petitioner would urge that this Court will determine that the preclusive effect of collateral estoppel should not apply.

This Honorable Court should also be aware of the jurisprudence holding that a general verdict does not provide a reviewing court with a basis for determining the findings of a jury. In **Angstrohm Precision v Vishay Intertechnolgy**, 567 F Supp 537, 543 (ED NY, 1982) the Court states that where:

> [a] judgment might have been based upon one or more of several grounds, but does not expressly rely upon any one of them, then none of them is conclusively established under the doctrine of collateral estoppel, since it is impossible for another court to tell which issue or issues were adjudged by the rendering court.

Petitioner would urge under the above-referenced juris- prudence that this Court find that collateral estoppel is not applicable since it is impossible to determine the actual basis upon which the jury rendered its verdict of second degree murder in respondent's first trial.

In Garcia v State, 768 SW2d 726 (Tex Crim App, 1987), the Court held that the fact that the defendant's voluntary manslaughter conviction was overturned on appeal adversely affected his claim of collateral estoppel. The Court explains:

> The doctrine of collateral estoppel was explained in **Ashe v Swenson**, 397 U.S. 436, 90 S Ct 1189, 25 L Ed 2d 469 (1970). The Court stated, "When an ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." **Ashe v Swenson**, supra, 90 S Ct at 1194. This Court has adopted this language that **there must be a final and valid judgment to support a claim of collateral estoppel. Dedrick v State**, 623 SW2d 332 (Tex Crim App, 1981); **Ex Parte Traver**, 725 SW2d 195 (Tex Crim App, 1986). [emphasis added]
> [**Garcia v State**, 768 SW2d at p 728-729]

The Court found that since the pending nature of an appeal can render a judgment "not final" for purposes of a double jeopardy claim, the reversal of a judgment on appeal should eliminate its status as being final and valid for purposes of collateral estoppel. The Court then states:

> An early writer on collateral estoppel discussed this issue. He wrote, "If the unsuccessful party appeals and the judgment is reversed, the original judgment is, of course, no longer conclusive; and if a new judgment is entered for the other party by

> the appellate court or at its direction by the trial court, that judgment is conclusive." Scott, "Collateral Estoppel by Judgment", 56 Harv. L. Rev. 1 (1942)
>
> In the instant case the Court of Appeals reversed the judgment and remanded the case to the trial court for a new trial. Using this analysis, not only is the conviction of voluntary manslaughter no longer valid and final, there will be no conclusive judgment on that matter until the appellant receives his new trial. A claim of collateral estoppel cannot flow from an invalid judgment of conviction which is not final.
>
> We hold that the Court of Appeals' reversal of appellant's voluntary manslaughter conviction bars the appellant's claim of collateral estoppel against his trial for attempted capital murder. The indictment for attempted capital murder is not to be dismissed. We reverse the judgment of the Court of Appeals and remand to the trial court. [**Garcia v State**, 768 SW2d at p 729]

In **Ex parte Campbell**, 872 SW2d 48 (Tex, 1994) the Court relying on **Garcia, supra**, and Ex parte **Lane**, 806 SW2d 336, 338 (Tex App --Fort Worth 1991, no pet.) reached the same result stating:

> This Court reversed the judgment of the trial court and remanded the case for a new trial. There is no final and valid judgment of conviction. The

> reversal of a judgment on appeal eliminates its status as being final and valid for purposes of collateral estoppel...

In the case **sub judice**, while Justice Cavanagh and Chief Justice Brickley base their respective collateral estoppel arguments on the **Ashe** case, they overlook the fact that collateral estoppel, as witnessed by the above referenced decisions does not apply because the reversal by the Court of Appeals in defendant's first appeal [App 3a] eliminates its status as being final and valid for purposes of collateral estoppel.

Petitioner respectfully urges that this Court will determine that collateral estoppel does not have legal application to this case, and that defendant's armed robbery conviction should be reinstated and thus affirmed.

[Conclusion]

Wherefore, petitioner respectfully requests that this Honorable Court will grant this petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Michigan.

Dated: August 9, 1995

Respectfully submitted:

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PEOPLE v GARCIA (AFTER REMAND)

Docket No. 129181. Submitted November 9, 1993, at Lansing. Decided February 7, 1994, at 9:25 A.M.

Frank Garcia was convicted by a jury in the Shiawassee Circuit Court, Gerald D. Lostracco, J., of second-degree murder and possession of a firearm during the commission of a felony and was sentenced. The convictions were based on the killing of an individual while the defendant and a codefendant were stealing his car. The jury had been instructed with regard to two counts: felony murder, including the lesser included offenses of second-degree murder and armed robbery; and felony-firearm. The defendant appealed, and the Court of Appeals, WEAVER, P.J., SHEPHERD and F. D. BROUILLETTE, JJ., reversed the defendant's convictions and remanded the case to the trial court for a new trial because the jury instructions and verdict form did not contain a general verdict of not guilty. Unpublished opinion of the Court of Appeals, decided October 19, 1988 (Docket Nos. 94233, 94822). On remand, the defendant was charged with three counts: second-degree murder, armed robbery, and felony-firearm. The court granted the defendant's motion to quash the armed robbery count on the basis of double jeopardy. The prosecutor's application for an interlocutory appeal was granted, and the Court of Appeals, WEAVER, P.J., and SHEPHERD and GRIFFIN, JJ., in an order dated May 15, 1989 (Docket No. 117306), reversed the order quashing the armed robbery count, stating that the prior opinion of the Court of Appeals in this matter did not preclude a new trial on the added count of armed robbery. On remand, following a second jury trial on the charges of second-degree murder, armed robbery, and felony-firearm, the jury returned verdicts of not guilty of second-degree murder and felony-firearm, and guilty of armed robbery,

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REFERENCES

Am Jur 2d, Criminal Law §§ 269, 276; Homicide §§ 184, 185, 190.

Conviction of lesser offense as bar to prosecution for greater on new trial. 61 ALR2d 1141.

Supreme Court's views as to application, in state criminal prosecutions, of double jeopardy clause of Federal Constitution's Fifth Amendment. 95 L Ed 2d 924.

and the defendant was again sentenced. The defendant appealed.

After remand, the Court of Appeals *held:*

The first jury's acquittal with regard to the felony-murder charge, by implication, served to acquit the defendant of armed robbery, the underlying offense. Because the defendant was acquitted of armed robbery in the first trial, his retrial with regard to that charge violated the principles of double jeopardy. The doctrine of the law of the case does not preclude the result reached by this panel of the Court of Appeals because the panel that issued the May 15, 1989, order did not address the central issue decided in this appeal. The defendant's conviction must be vacated and the matter remanded to the trial court for entry of an order discharging the defendant from custody.

Vacated and remanded.

1. CONSTITUTIONAL LAW — DOUBLE JEOPARDY.

A conviction of a lesser charge serves as an acquittal of higher charges; a conviction of a higher charge serves as an acquittal of a lesser indicated charge if the conviction of the higher charge cannot be had without a conviction of the lesser charge.

2. HOMICIDE — DOUBLE JEOPARDY — FELONY MURDER — ARMED ROBBERY — SECOND-DEGREE MURDER.

In a prosecution for felony murder for a killing committed during an armed robbery, a conviction of second-degree murder, which is subsequently overturned on appeal, bars the retrial of the defendant on the charge of armed robbery because the first conviction implied an acquittal of the charged lesser offense of armed robbery as well as the higher offense of felony murder.

Frank J. Kelley, Attorney General, *Thomas L. Casey,* Solicitor General, *Ward L. Clarkson,* Prosecuting Attorney, and *Michael A. Nickerson,* Assistant Attorney General, for the people.

Lawyers' Offices Dunchock, Linden & Reina, P.C. (by *Arnold D. Dunchock*), for the defendant.

AFTER REMAND

Before: MICHAEL J. KELLY, P.J., and HOOD and T. R. THOMAS,* JJ.

MICHAEL J. KELLY, P.J. This case has a long history. In 1985, while stealing a car, defendant, Frank Garcia, and his codefendant, Ronald Hammond, killed the owner. An information was filed charging defendant with one count of felony murder, MCL 750.316; MSA 28.548, an alternative count of open murder, and one count of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). A jury trial was held. The alternative count of open murder was dismissed by the trial court and the jury was instructed with regard to two counts: the first, felony murder, including the lesser included offenses of second-degree murder, MCL 750.317; MSA 28.549, pursuant to *People v Jenkins,* 395 Mich 440; 236 NW2d 503 (1975), and armed robbery, MCL 750.529; MSA 28.797, and a second count of felony-firearm. The jury returned verdicts of guilty of second-degree murder and felony-firearm, and defendant was sentenced to life imprisonment. Subsequently, this Court reversed defendant's convictions because the jury instructions and verdict form did not contain a general verdict of "not guilty." *People v Garcia,* unpublished opinion per curiam of the Court of Appeals, decided October 19, 1988 (Docket Nos. 94233 and 94822).

On remand, an information was filed charging defendant with three counts: (1) second-degree murder, (2) armed robbery, and (3) felony-firearm. Defendant moved to quash the armed robbery count, arguing that he was placed in jeopardy of an armed robbery conviction by being tried for felony murder and his implied acquittal of felony murder served to bar retrial on the armed robbery charge. The trial court granted defendant's motion to quash, but an interlocutory appeal by the prosecutor was granted. In an order dated May 15, 1989 (Docket No. 117306), a panel of this Court reversed the order quashing the armed robbery count, stating that its prior opinion in this matter did "not preclude a new trial on the added count of armed robbery." We think that panel clearly erred.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Following a second jury trial on the charges of second-degree murder, armed robbery, and felony-firearm, the jury returned verdicts of not guilty of second-degree murder and felony-firearm, and guilty of armed robbery. Defendant was again sentenced to life imprisonment. He appeals as of right. We vacate the conviction.

I

This case poses a question never before addressed in Michigan: In a prosecution for felony murder of a killing committed during an armed robbery, does a conviction of second-degree murder, which is subsequently overturned on appeal, bar retrial on the charge of armed robbery because the first conviction implied an acquittal of any charged lesser offenses (armed robbery) as well as higher offenses (felony murder)?

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." This guarantee applies to the states through the Due Process Clause of the Fourteenth Amendment. *Benton v Maryland,* 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969). The Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal. *North Carolina v Pearce,* 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969). Thus, the question: Was defendant acquitted of armed robbery in his first trial?

There is no doubt that a conviction of a lesser charge is an acquittal of higher charges. *Green v United States,* 355 US 184; 78 S Ct 221; 2 L Ed 2d 199 (1957); *People v Knapp,* 26 Mich 112 (1872). For example, a conviction of second-degree murder operates as an acquittal of a first-degree murder charge. *People v Deneweth,* 14 Mich App 604, 618; 165 NW2d 910 (1968).

Conviction of a higher charge serves as an acquittal of a lesser indicated charge if the conviction of the higher charge cannot be had without a conviction of the lesser charge. *Payne v Virginia,* 468 US 1062; 104 S Ct 3573; 82 L Ed 2d 801 (1984); *Harris v Oklahoma,* 433 US 682; 97 S Ct 2912; 53 L Ed 2d 1054 (1977).

This case turns on the relationship between felony murder, the highest charged offense in the first trial, second-degree murder, the highest convicted offense in the first trial, and armed robbery, a charged offense in both trials and the highest convicted offense in the second. The felony-murder statute, MCL 750.316; MSA 28.548, provides:

> Murder which is perpetrated by means of poison, lying in wait, or other wilful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate . . . robbery. . . is murder of the first degree, and shall be punished by imprisonment for life.

Second-degree murder, MCL 750.317; MSA 28.549, is defined as follows:

> All other kinds of murder shall be murder of the

> second degree, and shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same.

The armed robbery statute, MCL 750.529; MSA 28.797, provides:

> Any person who shall assault another, and shall feloniously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years.

In the original prosecution for felony murder, armed robbery was the underlying felony. It is clear that proof of that felony murder assumes proof of each element of armed robbery. Had the defendant been convicted of felony murder, which was later reversed, then, a second trial for armed robbery would not have been precluded under *Payne*. The relationship between armed robbery and second-degree murder is altogether different, however. Proof of second-degree murder does not require proof of an underlying offense. Under the rule of *Payne*, conviction of second-degree murder does not ipso facto operate to bar a second prosecution for armed robbery. But another step is necessary in the analysis. In this case, the only difference between second-degree murder and felony murder is the concurrent commission of armed robbery to elevate second-degree to first-degree. See *People v Aaron*, 409 Mich 672, 719, 730; 299 NW2d 304 (1980). The first jury found a murder had been committed, but it did not find an armed robbery had been committed sufficient to elevate its verdict to first-degree murder. Simply put, the jury did not find an armed robbery or its verdict would have been guilty of felony murder. *Aaron, supra* at 725. Thus, the jury's acquittal with regard to the felony-murder charge, by implication, served to acquit the defendant of armed robbery. By subtracting the elements of the convicted offense of second-degree murder from the acquitted offense of felony murder, it is ineluctable that the jury also found insufficient proof of armed robbery. Thus, the defendant stood acquitted of armed robbery after the first trial. His retrial on that charge violated the principles of double jeopardy under *Payne.*

II

We reject the prosecutor's argument based on the doctrine of the law of the case. The narrow language of this Court's May 15, 1989, interlocutory order, coupled with the strict terms of the opinion, states that the October 19, 1988, opinion for reversal did not preclude retrial for armed robbery. That panel did not address, however, the central question in this appeal, which involved the relationship between armed robbery and felony murder. Perhaps it should have, but it did not. Therefore, the doctrine of the law of the case does not preclude the result reached herein.

The defendant was acquitted impliedly of first-degree felony murder and armed robbery in the first trial. He was acquitted of second-degree murder and felony-firearm in the second. In sequence, he has been acquitted of every crime he has been charged with. As a result, there is no charge remaining for a third trial. The conviction is vacated and the matter remanded to the circuit court to order the defendant discharged from custody.

Vacated and remanded.

PEOPLE v GARCIA

Docket No. 98969. Argued January 11, 1996 (Calendar No. 6). Decided April 18, 1996.

Frank Garcia was convicted by a jury in the Shiawassee Circuit Court, Gerald D. Lostracco, J., of second-degree murder and possession of a firearm during the commission of a felony. The Court of Appeals, WEAVER, P.J., and SHEPHERD and F. D. BROUILLETTE, JJ., reversed in an unpublished opinion per curiam, holding that the defendant was entitled to a new trial because the verdict form did not allow a general verdict of not guilty of the first-degree felony murder charge, and, thus, he had been impliedly acquitted of first-degree murder (Docket No. 94233). On remand, the prosecutor filed an information charging second-degree murder, armed robbery, and felony-firearm. The court granted the defendant's motion to quash the armed robbery count. Thereafter, the prosecutor filed an interlocutory appeal, and the Court of Appeals, WEAVER, P.J., and SHEPHERD and GRIFFIN, JJ., reversed in an unpublished order (Docket No. 117306). At the second trial, the defendant was found guilty of armed robbery. After remand, the Court of Appeals, MICHAEL J. KELLY, P.J., and HOOD and T. R. THOMAS, JJ., reversed, holding that the first jury's failure to convict of first-degree felony murder, together with the conviction of second-degree murder, necessarily established that the defendant was not guilty of the lesser-included offense of armed robbery (Docket No. 129181). The people appeal.

The judgment of the Court of Appeals was affirmed by equal division.

Justice RILEY, joined by Justices BOYLE and MALLETT, writing for reversal, stated that the defendant's implicit acquittal of first-degree murder did not operate as an implied acquittal of the predicate offense of armed robbery. The defendant was properly retried for the crime of armed robbery.

The operative inquiry for double jeopardy purposes to determine if a person has been implicitly acquitted is whether the factfinder was offered a choice to convict the defendant of the alleged offense. Implicit acquittal arises only where it is evident that the jury has been afforded an opportunity to fully consider and decide a defendant's guilt or innocence with regard to a lesser offense so that the jury may be presumed to have acquitted the defendant of the greater offense. In this case, the jury was not given such a choice; rather, it was allowed to choose only one verdict, and its conclusion with respect to armed robbery is inherently ambiguous. Therefore, the defendant's double jeopardy rights were not violated during retrial because he was not implicitly acquitted of armed robbery. Even if the collateral estoppel doctrine were to apply to an implied acquittal, neither doctrine may be expanded to the lesser-included offense, armed robbery.

Inconsistent verdicts do not bar retrial in this case on double jeopardy grounds. Inconsistent verdicts suggest that the jury either compromised or was lenient. If the jury was lenient, the defendant was not injured; if it compromised, so that it could not reach a unanimous verdict, the remedy is not dismissal, but declaration of a mistrial, permitting the defendant to be retried for the charges on which the jurors were unable to agree. Moreover, it is possible for a jury to reach separate conclusions on an identical element of two different offenses. There is no reason to vacate a conviction because the verdicts rationally cannot be reconciled. In this case, because the Court of Appeals did not consider the legal possibility of a conviction of second-degree murder and armed robbery where the jury refused to convict of first-degree murder, it erred in concluding that the jury necessarily found or even considered the defendant not guilty of armed robbery.

Justice CAVANAGH, joined by Justice LEVIN, writing for affirmance, stated that the collateral estoppel doctrine and the same-transaction test barred the defendant's subsequent trial for armed robbery.

This is not a case in which second-degree murder was a lesser-included offense of a murder that arose independently of the underlying felony. Moreover, the defendant was not separately charged with armed robbery. Therefore, in the first trial, the only way the jury could have convicted the defendant of armed robbery was as a cognate lesser-included offense of first-degree felony murder. The first jury determined that all the elements of murder had been proven beyond a reasonable doubt when it convicted the defendant of second-degree murder. If it also had determined that the defendant was guilty of armed robbery, it was obligated to return a verdict of guilty of first-degree felony murder. Therefore, it is reasonable to conclude that at least one of the elements of armed robbery was not proven beyond a reasonable doubt and that the issue of the defendant's guilt of that crime was resolved. Collateral estoppel barred relitigation of those issues during the second trial.

Once the jury impliedly acquitted the defendant of first-degree murder, that charge essentially disappeared—except for the lesser-included offense of which the defendant actually was convicted, second-degree murder. Because armed robbery is not a lesser-included offense of second-degree murder, there was no theory that remained from the first trial that would support a conviction of armed robbery. Because the armed robbery charge was not joined with the murder charges that arose out of the same criminal episode in the first information, the same-transaction test was violated when the prosecutor brought the subsequent armed robbery charge in the second trial.

Chief Justice BRICKLEY, joined by Justices LEVIN and CAVANAGH, writing for affirmance, stated that the doctrine of collateral estoppel is fully applicable in this case and requires reversal of the defendant's conviction of armed robbery. A reviewing court must presume a rational jury in applying the doctrine of collateral estoppel. In the context of successive prosecutions, the presumption of jury rationality is necessary to guard the constitutional guarantee against double jeopardy and the interests it protects, i.e., harassment by the state and the preservation of the finality of judgments. The jury's verdict in the defendant's first trial may or may not have been the product of leniency or compromise, but an appellate court cannot know the answer to the question, and it should not speculate.

Affirmed by equal division.

Justice WEAVER took no part in the decision of this case.

203 Mich App 420; 513 NW2d 425 (1994) affirmed.

Frank J. Kelley, Attorney General, *Thomas L. Casey*, Solicitor General, *Ward L. Clarkson*, Prosecuting Attorney, and *Randy O. Colbry*, Assistant Prosecuting Attorney, for the people.

Arnold D. Dunchock; Thomas M. Donnellan, of counsel, for the defendant.

RILEY, J. (*for reversal*). In this case we decide whether defendant's implicit acquittal of first-degree felony murder, by virtue of his conviction of second-degree murder, prevents retrial of the lesser-included offense of armed robbery because his guilt or innocence was necessarily determined by the implicit acquittal of first-degree murder. We conclude that defendant was not implicitly acquitted of the lesser-included offense of armed robbery and, therefore, was properly retried for that offense.

I

Defendant Frank Garcia and his companion Ronald Hammond were arrested in connection with a December 3, 1985, carjacking and subsequent fatal shooting of Timothy Kiley. Mr. Kiley was assaulted and shot in the head when he refused Hammond's order to get into the trunk of his car. On a theory of aiding and abetting, Garcia was charged with first-degree felony murder, using armed robbery as the underlying offense. Additionally, he was charged with an alternative count of open murder and possession of a firearm during the commission of a felony. The count of open murder was dismissed by the trial judge before jury deliberation.

The jury deliberated on the remaining two counts. On the first count, first-degree felony murder, the jury was instructed on the lesser-included offenses of second-degree murder and armed robbery. The verdict form[1] instructed the jury regarding the first count:

> You may return only one verdict on this charge. Mark only one box for this count.
>
> ☐ Not guilty of 1st degree felony murder
> ☐ Guilty of 1st degree felony murder
>
> Or Guilty of the lesser included offense of:
>
> ☐ 2nd degree murder
> ☐ Armed robbery. [Emphasis in original.]

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[1] The original verdict form appears in the appendix.

Significantly, the jury was not afforded the opportunity to return a general verdict of "not guilty" on the entire first count. As to the second count, the jury was told that it could find defendant guilty or not guilty of felony-firearm. The jury found Garcia guilty of second-degree murder and felony-firearm, and he was sentenced to life imprisonment.

Garcia appealed, alleging, inter alia, that the verdict form did not provide the jury with the opportunity to return a general verdict of "not guilty" on count one. On the basis of that fact, the Court of Appeals reversed and held that defendant was entitled to a new trial.[2] Additionally, the Court held that because the jury had impliedly acquitted defendant of first-degree murder, he could not be recharged and convicted of the greater offense of first-degree murder.

On remand, the prosecutor filed an information charging Garcia with three counts: second-degree murder, armed robbery, and felony-firearm. Garcia moved to quash the armed robbery count on double jeopardy grounds because his implied acquittal of first-degree felony murder (through his second-degree murder conviction) also constituted an implied acquittal of the lesser-included offense of armed robbery. The motion to quash was granted. The prosecutor filed an interlocutory appeal, and the Court of Appeals reversed, holding that defendant could be retried for the offense of armed robbery.[3] Defendant did not appeal the order in this Court.[4] At his second trial, Garcia was found guilty of armed robbery and again sentenced to life imprisonment. Defendant appealed, and the Court of Appeals reversed. The Court held that because the first jury did not convict Garcia of first-degree felony murder, and the only difference between that offense and second-degree murder (of which he was convicted) is the concurrent commission of a felony, Garcia could not be retried for that offense.[5]

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[2] Unpublished opinion per curiam, issued October 19, 1988 (Docket No. 94233).

[3] Unpublished order, entered May 15, 1989 (Docket No. 117306).

[4] Defendant's failure to appeal the decision in this Court should

We granted leave to appeal[6] and now would reverse the decision of the Court of Appeals. We would hold that Garcia's implicit acquittal of first-degree murder did not operate as an implied acquittal of the predicate offense of armed robbery. Defendant was therefore properly retried for the crime of armed robbery and his conviction should be upheld.

II

The Double Jeopardy Clause of the Fifth

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preclude him from raising the issue on his subsequent appeal. In the second appeal to the Court of Appeals, the panel held that defendant could be retried for armed robbery. Relying on that decision, the prosecutor filed a new information with armed robbery as one of the charges. After the jury convicted him of armed robbery, Garcia again appealed to the Court of Appeals. Defendant should have been foreclosed from raising that issue because it would violate the law of the case doctrine, which states:

> [I]f an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same. [*CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981).]

The law of the case doctrine is, therefore, similar to the doctrines of claim and issue preclusion. *Locricchio v Evening News Ass'n*, 438 Mich 84, 109; 476 NW2d 112 (1991). However, because the issue was not sufficiently raised before this Court, we do not decide the case on the basis of the law of the case, but rather address the merits of defendant's claim.

[5] 203 Mich App 420; 513 NW2d 425 (1994).

[6] 446 Mich 865 (1994).

Amendment mandates that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb . . . ." The Double Jeopardy Clause protects against three general governmental abuses: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *Ohio v Johnson,* 467 US 493, 497; 104 S Ct 2536; 81 L Ed 2d 425 (1984).[7] The protections apply to the states through the Due Process Clause of the Fourteenth Amendment. *Benton v Maryland,* 395 US 784; 89 S Ct 2056; 23 L Ed 2d 707 (1969). In the present case, we are concerned with that part of the Double Jeopardy Clause that prohibits retrial after an acquittal. Specifically, we must determine the scope of that protection to decide whether the defendant has been "implicitly acquitted" of the lesser offense of armed robbery by his conviction of second-degree murder.

A

The seminal case involving retrial after an implicit acquittal is *Green v United States,* 355 US 184; 78 S Ct 221; 2 L Ed 2d 199 (1957). In *Green,* the jury was instructed on the offenses of first- and second-degree murder, and found the defendant guilty of second-degree murder. After a successful appeal, the defendant's conviction was reversed. On remand, the defendant was again tried for first- and second-degree murder and ultimately convicted of first-degree murder. The Court held that the defendant's retrial on the charge of first-degree murder subjected him to double jeopardy.[8]

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[7] Citing *Brown v Ohio,* 432 US 161, 165; 97 S Ct 2221; 53 L Ed 2d 187 (1977), and *North Carolina v Pearce,* 395 US 711; 89 S Ct 2072; 23 L Ed 2d 656 (1969). See also *People v Gonzalez,* 197 Mich App 385; 496 NW2d 312 (1992).

Applied to the present case, *Green* precludes retrial of Garcia for first-degree murder. However, *Green* does not specifically address the issue before this Court, i.e., whether defendant may be retried for the lesser-included offense of armed robbery after an implicit acquittal of first-degree felony murder.[9] The theory behind *Green* and its progeny, however, remain essential to our decision. We therefore closely examine the principles underlying *Green* and subsequent cases applying it, in order to determine whether it extends to prohibit Garcia's retrial on the offense of armed robbery. After careful scrutiny of *Green* and its progeny, we conclude that Garcia was not implicitly acquitted of armed robbery and, therefore, his double jeopardy rights were not violated when he was retried for that offense.

In support of this conclusion, we cite the precise factors that *Green* and several ensuing cases have required before determining whether a person was implicitly acquitted. *Green* held that if the jury is "given a full opportunity to return a verdict" on a greater offense and instead convicts on a lesser offense, an implicit acquittal with respect to the greater offense results. *Id.* at 191. An additional *Green* requirement is that "no extraordinary circumstances . . . prevented it from" returning a verdict on the greater offense. *Id.* Several cases have construed and applied this language in the context of different fact patterns—each of which aid us in applying the language enunciated in *Green* to the present case.

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[8] The Court stated that "this case can be treated no differently, for purposes of former jeopardy, than if the jury had returned a verdict which expressly read: 'We find the defendant not guilty of murder in the first degree but guilty of murder in the second degree.'" *Id.* at 191.

See also *Price v Georgia*, 398 US 323, 329; 90 S Ct 1757; 26 L Ed 2d 300 (1970), in which the Court, mindful of its decision in *Green*, stated, "this Court has consistently refused to rule that jeopardy for an offense continues after an acquittal, whether that acquittal is express or implied by a conviction on a lesser included offense when the jury was given a full opportunity to return a verdict on the greater charge." The Court also stated that the Double Jeopardy Clause protects against "the risk that an accused for a second time will be convicted of the 'same offense' for which he was initially tried." *Id.* at 326.

[9] Justice CAVANAGH fails to recognize this crucial fact and proceeds on the basis that *Green* may be read to preclude retrial of a lesser-included offense. There has, however, been no implicit acquittal of defendant on the charge of armed robbery under *Green*. This novel reading of *Green*, that a defendant may not be retried for a lesser-included offense after an implicit acquittal of the greater offense, extends that decision to bar retrial in a situation clearly not contemplated in *Green*.

One such case was decided by this Court, *People v McMiller,* 389 Mich 425, 431; 208 NW2d 451 (1973).[10] In that case, we concluded that the operative inquiry to determine if a person has been implicitly acquitted is whether the factfinder was offered a *choice* to convict the defendant of the alleged offense. Therefore, the critical element for purposes of jeopardy is the defendant's exposure to such a choice being given to the factfinder.[11] *Id.*

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[10] We analyze *McMiller* for its application of *Green* while recognizing that it involved a defendant who was retried on a greater offense after pleading guilty of a lesser offense. The Court concluded that "upon the acceptance of a plea of guilty, as a matter of policy, the state may not thereafter charge a higher offense arising out of the same transaction." *Id.* at 434. Therefore, the doctrine of implied acquittal was held to apply to a guilty plea conviction.

However, *McMiller* was abrogated by MCR 6.312, which states:

> If a plea is withdrawn by the defendant or vacated by the trial court or an appellate court, the case may proceed to trial on any charges that had been brought or that could have been brought against the defendant if the plea had not been entered.

[11] See *Commonwealth v Tabb,* 491 Pa 372, 377; 421 A2d 183 (1980), in which the Supreme Court of Pennsylvania held that "the *sine qua non* for finding implicit acquittal is failure to convict in the face of full opportunity for conviction." The court found that a plea agreement in which the defendant pleaded guilty of murder generally and a conviction of third-degree murder was entered pursuant to the plea

In the present case defendant was not "exposed" to the factfinder's "choice" of convicting him. Because the jury was allowed to choose only one verdict, an extraordinary circumstance envisioned by *Green* resulted, i.e., the jury was not afforded a full opportunity to return a verdict on the offense of armed robbery. Instead, the jury was allowed to choose only one verdict. Thus, we are persuaded that the jury was not given an appreciable choice.[12]

Moreover, the Supreme Court of Georgia has determined that essential to an implicit acquittal of a greater offense is an unambiguous conviction of a lesser-included offense. *Potts v State,* 258 Ga 430, 434; 369 SE2d 746 (1988). We find persuasive the analysis articulated by the *Potts* court. Holding that the verdict for the lesser-included offense was ambiguous,[13] the court stated: "We therefore hold that a necessary premise for application of the *Green-Price* rule—an unambiguous conviction of the lesser-included offense—is not present." *Id.* at 433. Relying on *Green,* the court concluded that "a jury does not have a full opportunity [to convict] if the court restricts the jury's freedom to

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did not preclude him from retrial on first- or second-degree murder. For support, the court cited a similar case, *Commonwealth v Klobuchir,* 486 Pa 241, 252; 405 A2d 881 (1979), in which the court held that no judge or jury was presented with a "choice" in the first prosecution and "[t]hus the linchpin necessary to sustain a theory of double jeopardy based upon successive prosecutions [was] missing."

[12] See discussion in part IV.

[13] Count three alleged that the defendant was guilty of kidnapping involving bodily injury. The court stated that count three accused the defendant of kidnapping, but did not instruct or mention bodily injury. In its verdict, the jury stated that it found the defendant guilty of kidnapping and also that the defendant was " 'guilty as to Count Three . . . .' " *Id.* at 433. The court was unable to determine whether the jury meant to find the defendant guilty of merely kidnapping or kidnapping involving bodily injury, stating: "In light of these conflicting circumstances, we conclude that the verdict is opaque, and thus that it does not support an inference that the jury intended to find Potts guilty of either kidnapping or kidnapping with bodily injury." *Id.*

choose between the greater and lesser offenses." *Id.* at 434. The court was not able to determine whether the jury truly chose to convict the defendant on the lesser-included offense.

Unlike *Potts,* the jury clearly convicted the defendant of second-degree murder in the present case. However, for the same reason *Potts* required an unambiguous conviction of a lesser-included offense to impliedly acquit of the greater, we would hold that an unambiguous verdict must be rendered with regard to armed robbery in the present case. Because, in the case at bar, the jury was restricted from returning more than one verdict, as in *Potts,* it was not afforded a full opportunity to choose between the various offenses, and so its choice of second-degree murder renders its conclusion with regard to armed robbery inherently ambiguous. The jury's silence on the offense of armed robbery is of no significance because the jury was *required* to remain silent if it determined that defendant was guilty of second-degree murder, which it did.[14] However, because defendant was tried on the theory of aiding and abetting, using duress as his defense, the jury may have rejected the verdict of first-degree murder in the exercise of lenity, yet not found his involvement so minimal as to justify a verdict of merely armed robbery. As a result of these possibilities, inter alia, the verdict is ambiguous and any further analysis of the verdict is mere speculation.[15]

Another decision that clarifies the scope of implicit acquittals is *Johnson v Commonwealth of Virginia,* 221 Va 736; 273 SE2d 784 (1981).[16] In

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[14] Moreover, Justice CAVANAGH acknowledges that the jury "did not express any specific verdict with regard to armed robbery." *Post* at 474.

[15] See n 25.

[16] In *Johnson, supra* at 741, the defendant also claimed that because

Johnson, the defendant was convicted of capital murder and of using a pistol in the commission of murder. He was found not guilty of robbery. The Virginia Supreme Court reversed for instructional error and remanded the case for retrial. The jury instructions in the defendant's first trial produced a dilemma analogous to that produced by the instructions in the present case. The jury was instructed that it would not be able to find the defendant guilty of both capital murder and robbery. After his conviction was reversed and before his second trial, the defendant argued that his case should be dismissed or reformed on grounds of double jeopardy. The defendant alleged that "since he was 'acquitted' of robbery at the first trial he could not be tried for capital murder because the elements of an armed robbery are integral to a conviction of murder in the commission of armed robbery." *Id.* at 739.

The court concluded that the jury did not resolve the issue of the defendant's guilt because, in order to convict the defendant of armed robbery, it would have had to ignore the court's instructions. Similarly, in the present case, because the jury found defendant guilty of second-degree murder, it

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robbery is a lesser-included offense of capital murder and "that since every element necessary to establish the corpus delicti of robbery is relevant and essential to the proof of capital murder, the reciprocal nature of the double jeopardy clause prohibit[ed] his conviction of capital murder based on robbery when the defendant had previously been acquitted of that robbery." The defendant's motion was denied and, on retrial, he was again convicted of capital murder.

In determining whether his acquittal of robbery at his first trial precluded retrial of capital murder, the court held that the "dispositive issue is whether for double jeopardy purposes there has ever been a factual acquittal of the defendant on the robbery charge." *Id.* The court held that it "would stultify itself to hold that the jury in this case made a factual finding that Johnson was innocent of robbery. We would have to find that it ignored the court's instruction and that its finding of not guilty under Count I was completely unrelated to the express direction it had received from the court to return such a verdict if it found defendant guilty of capital murder." *Id.*

was precluded from determining defendant's guilt or innocence with regard to armed robbery. Accordingly, it is impossible to hold that the jury in this case had a full opportunity to consider defendant's guilt or innocence with regard to armed robbery.

While *Green, McMiller, Potts,* and *Johnson* are distinguishable, the theories underlying the rules enunciated in those cases provide reasonable bases for the decision in the instant case. From these cases, we glean the rule that an implicit acquittal involves the jury's clear and articulable decision of guilt with regard to a lesser offense, in the face of a full opportunity to convict. In other words, an implicit acquittal arises only where it is evident that the jury has been afforded the opportunity to fully consider and decide the defendant's guilt or innocence with regard to the lesser offense so that the jury may be presumed to have acquitted the defendant of the greater offense. In the present case, it cannot be said that the jury was given such a full opportunity because it was allowed to choose only one verdict. Therefore, the risk that *Green* and its progeny seek to protect was not violated in defendant's retrial because he was not implicitly acquitted of armed robbery.[17]

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[17] Our conclusion would not violate the double jeopardy risk protected by *Green*. In *Green, supra* at 192, the Court reasoned that to allow the defendant to be retried for first-degree murder because he "waived" his defense of former jeopardy would be to leave the defendant with "no meaningful choice." If he had "waived" his rights, the Court stated, it would be "wholly fictional to say that he 'chooses' to forego his constitutional defense of former jeopardy on a charge of murder in the first degree in order to secure a reversal of an erroneous conviction of the lesser offense." *Id.* In that situation the defendant would be taking a "desperate chance" by appealing the case. The Court stated:

> The law should not, and in our judgment does not, place the defendant in such an incredible dilemma. Conditioning an appeal of one offense on a coerced surrender of a valid plea of

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Additionally, our decision that defendant's retrial does not violate the principles of *Green* is augmented by the fact that subsequent cases have not prohibited retrial of a defendant for a lesser-included offense after an implicit acquittal of a greater offense. In *Edmonds v United States*, 106 US App DC 373; 273 F2d 108 (1959), the defendant was indicted for first-degree murder, but was convicted of second-degree murder. The conviction was reversed on appeal, and the defendant argued, under *Green,* that he was immune from reprosecution for any offense included in the first-degree murder count of the indictment. The court rejected the defendant's argument and concluded that *Green* stands for the proposition that the defendant could not be retried for first-degree murder because he was implicitly acquitted of that charge. In defining the applicability of *Green,* the court held, however, that *Green* did "not go so far as to say he [could not] be tried again for second degree murder. Indeed a contrary view may be said to be indicated."[18] *Edmonds, supra* at 378.

Similarly, in *United States v Gooday,* 714 F2d 80, 83 (CA 9, 1983), the court addressed the situation in which a jury acquitted a defendant of first-degree murder, but was unable to reach a verdict on the lesser included offenses of second-degree murder, voluntary manslaughter, and involuntary manslaughter. Relying on *Edmonds,* the court concluded that "acquittal on the indictment's first-

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> former jeopardy on another offense exacts a forfeiture in plain conflict with the constitutional bar against double jeopardy. [*Id.* at 193-194.]

Garcia is not exposed to that danger in the present case.

[18] We note that the defendant was retried for second-degree murder, of which he was convicted at his first trial.

degree murder count does not preclude retrial on the three lesser included offenses on which the jury was instructed." The court relied on *Edmonds, supra,* and stated that *Green* gave "independent force to lesser included offenses on which a jury has been instructed under one count of the indictment." *Id.* at 83. In other words, under *Green,* a defendant may be retried for any of the lesser included offenses, but may not be retried for an offense greater than the one of which he was originally convicted.[19] *Edmonds* and *Gooday* have not interpreted *Green* to prohibit retrial for a lesser included offense of the offense of which the defendant was implicitly acquitted. Accordingly, both cases support our conclusion today, that defendant may be retried for armed robbery, which is a lesser-included offense of first-degree felony murder, of which he was implicitly acquitted.

C

Justice CAVANAGH contends that the collateral estoppel doctrine as enunciated in *Ashe v Swenson,* 397 US 436; 90 S Ct 1189; 25 L Ed 2d 469 (1970), applies so as to preclude defendant's retrial of armed robbery in the present case. In *Ashe,* six men were playing poker in the basement of a home when three or four men armed with a shotgun and pistols broke into the basement and robbed each of the players. The defendant was tried and found not guilty "due to insufficient evidence" of robbery of one of the victims.[20] Several weeks later, the defendant was tried again for robbery of one of the other victims. The issue in both trials was whether the defendant was one of the robbers: "For the name of the victim, in the circumstances of this case, had no bearing whatever upon the issue of whether the petitioner was one of the robbers." *Id.* at 446. The jury in the first trial concluded that the defendant was not one of the robbers. Therefore, the Court held that the federal collateral estoppel rule was embodied in the Fifth Amendment, so that defendant could not be tried for the robbery of another victim. *Id.* at 444-445.

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[19] In fact it was held in *United States v Scott,* 437 US 82, 97; 98 S Ct 2187; 57 L Ed 2d 65 (1978), that "a defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.' "

[20] The jury was instructed that "if the petitioner was one of the robbers, he was guilty under the law even if he had not personally robbed [one of the victims]." *Id.* at 439.

Similarly, in *Turner v Arkansas*, 407 US 366; 92 S Ct 2096; 32 L Ed 2d 798 (1972), the defendant was acquitted of murder by a general verdict of not guilty. The defendant was subsequently charged with armed robbery. The Court concluded that the acquittal resolved issues that would preclude the defendant from being tried for armed robbery. The state argued that the jury may have concluded that the defendant robbed the victim but that others actually committed the murder. However, such a result was not possible in light of the jury instructions:

> "An accessory is one who stands by, aids, abets, or assists . . . the perpetration of the crime.
>
> * * *
>
> "All persons being present, aiding and abetting, or ready and consenting to aid and abet, in any felony, shall be deemed principal offenders, and indicted or informed against, and punished as such." [*Id.* at 369.]

In *Turner,* the Court correctly held: "The only logical conclusion is that the jury found him not present at the scene of the murder and robbery . . . ." *Id.*

On the basis of these decisions, Justice CAVANAGH maintains that a final verdict was rendered with regard to armed robbery, and retrial of that offense is thus barred by collateral estoppel. We do not agree.[21] As Justice CAVANAGH concedes, in the present case the jury *only* spoke with regard to second-degree murder—guilty. The jury, therefore, impliedly rendered a decision with regard to first-degree felony murder—not guilty. Even if the collateral estoppel doctrine applies to a judgment of implied acquittal pursuant to *Green*, as Justice CAVANAGH maintains, *post* at 479-480, neither doctrine may be expanded to apply to the lesser-included offense of that offense which defendant was impliedly acquitted, i.e., armed robbery. To do so would be to extend the principles of *Ashe, Turner*, and *Green* far beyond recognizable boundaries. On the basis of the instructions given in the present case,[22] the jury did not render a verdict with regard to armed robbery. *Ashe* and *Turner* involve situations in which an appellate court was able to review the instructions and unequivocally determine that the jury had rendered a decision that precluded a subsequent trial.

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[21] Justice CAVANAGH additionally maintains that because neither party objected to the instructions, the verdict was a valid and final judgment with regard to armed robbery. The fact that neither party objected is wholly irrelevant for purposes of this decision. The issue here is whether defendant was implicitly acquitted of armed robbery. The instructions render the verdict with regard to armed robbery ambiguous. It would be impossible and inappropriate to expect either counsel to predict and object to the instructions on the ground that the instructions may lead to a subsequently unexplainable verdict with regard to armed robbery.

[22] Contrary to Justice CAVANAGH's and Chief Justice BRICKLEY's position, we cannot agree that the jury was *obligated* to return a verdict of first-degree felony murder if it determined that defendant was guilty of second-degree murder and guilty of armed robbery. An instruction regarding the difference between first-degree felony murder and second-degree murder does not obligate the jury to any rational verdict. *People v Lewis*, 415 Mich 443; 330 NW2d 16 (1982).

> [W]hat makes second degree murder rise to the level of, in this case, first degree felony murder is this added element necessary for first degree felony murder; that the Defendant, Mr. Garcia, was committing or attempting to commit a felony; that is, armed robbery, at the time of the act that caused the victim, Mr. Timothy Roger Kiley's death.

Further, in both *Ashe* and *Turner*, the defendants were retried after a jury returned a general verdict of acquittal. In the present case, defendant was convicted and he appealed. This case is therefore more analogous to and should be evaluated under *Green* and its progeny. *Green's* unambiguous holding dictates that defendant could not be retried for the greater offense—first-degree felony murder—after conviction of the lesser-included offense—second-degree murder. *Green* does not prohibit retrial of a lesser-included offense (armed robbery) of the offense for which he was implicitly acquitted (first-degree felony murder). Neither Justice CAVANAGH nor Chief Justice BRICKLEY cites a single case that prohibits retrial of a lesser-included offense after the defendant successfully appeals his conviction and is retried. *Green* very simply and unambiguously states that defendant may not be retried for first-degree felony murder, and defendant was not.[23]

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[23] Moreover, we do not find Justice CAVANAGH's discussion of *People v White*, 390 Mich 245; 212 NW2d 222 (1973), relevant. In *White*, the defendant was tried and convicted of kidnapping in March, 1969, and then subsequently tried and found guilty in October, 1969, on the charges of rape and felonious assault. All three crimes arose out of the same criminal transaction. The defendant therefore appealed, alleging that his double jeopardy rights had been violated. *Id.* at 251-252. The Court noted:

> At oral argument, the prosecutor conceded the one reason for bringing the charges was because he was unhappy with the sentence defendant received on the kidnapping conviction. He stated that he waited until after the first sentence was given in circuit court before deciding to bring to trial the pending prosecution in recorder's court. Such harassment is prohibited. [*Id.* at 259-260, n 9.]

III

Our review of case law regarding inconsistent verdicts also persuades us that double jeopardy does not bar retrial in this case.[34] The Court of Appeals did not consider the possibility of an inconsistent verdict when it addressed the issue of double jeopardy. Instead the Court held that the jury's failure to convict of first-degree felony murder, together with its conviction of second-degree murder, necessarily established that the jury found Garcia not guilty of armed robbery.[35]

It is evident that retrial of defendant does not violate the principles enunciated in *White*, i.e., prevention of the prosecutor from bringing a subsequent prosecution after obtaining a conviction arising out of the same transaction. The situation in *Garcia* is clearly distinguishable. Defendant was tried and *he* then appealed that decision, and therefore may be retried for all offenses of which he was not implicitly acquitted. To apply the same-transaction test to this case, as Justice CAVANAGH proposes, so that defendant could not be retried for armed robbery because he was not formally charged with that offense, would be a misapplication of *White:* "strict application of the same transaction test could lead to the anomalous result of foreclosing prosecution for an offense where the state had made a diligent and good faith effort to protect the defendant's constitutional rights." *Id.* at 258, n 6. The present case does not present a situation in which the prosecution is attempting to prosecute defendant for the first time for a new offense. Armed robbery, although not formally charged in the first trial, was a crime that the state originally sought to prosecute. After conviction, defendant appealed and may now be retried for any offense of which he was not acquitted. Defendant was only acquitted of first-degree felony murder. *Green, supra.*

[34] We agree with Justice CAVANAGH that an inconsistent verdict does not necessarily exist in this case. We discuss the issue only because, in order to achieve the conclusion reached by the Court of Appeals and Justice CAVANAGH, it is necessary to conclude that the verdicts are inconsistent, i.e., defendant was impliedly not guilty of first-degree felony murder in the first trial, and any result other than a jury verdict of not guilty with regard to armed robbery would be an inconsistent verdict. We merely hold that such a conclusion is not dictated after a review of the *present* law of inconsistent verdicts.

[35] The Court of Appeals relied on *People v Aaron*, 409 Mich 672; 299 NW2d 304 (1980), and concluded:

> In this case, the only difference between second-degree murder and felony murder is the concurrent commission of armed robbery to elevate second-degree to first-degree. . . . The first

Before *People v Vaughn,* 409 Mich 463; 295 NW2d 354 (1980), inconsistent verdicts in this jurisdiction could not stand unless explainable on a rational basis.[illegible] More recently, this Court has recognized the jury's power of leniency and allowed inconsistent verdicts to stand. *Vaughn, supra; People v Lewis,* 415 Mich 443; 330 NW2d 16 (1982). *Lewis* was a consolidated case in which three defendants were charged with committing a

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> jury found a murder had been committed, but it did not find an armed robbery had been committed sufficient to elevate its verdict to first-degree murder. Simply put, the jury did not find an armed robbery or its verdict would have been guilty of felony murder. . . . Thus, the jury's acquittal with regard to the felony-murder charge, by implication, served to acquit the defendant of armed robbery. [203 Mich App 425-426.]

We note that *Aaron* held that "Michigan has no statutory felony-murder rule which allows the mental element of murder to be satisfied by proof of the intention to commit the underlying felony." The Court *specifically* held that in order to convict a defendant of murder, "it must be shown that he acted with intent to kill or to inflict great bodily harm or with a wanton and willful disregard of the likelihood that the natural tendency of his behavior [was] to cause death or great bodily harm. We further hold that the issue of malice must always be submitted to the jury." *Id.* at 733.

Notably, the Court's analysis of the jury's verdict was arguably impermissible. In reaching its result, it was necessary for the Court of Appeals to speculate with regard to the jury's verdict. While it is an appellate court's duty to review jury verdicts, it may not speculate regarding a jury's conclusions. *People v Chamblis,* 395 Mich 408, 426; 236 NW2d 473 (1975), citing *Dunn v United States,* 284 US 390, 394; 52 S Ct 189; 76 L Ed 356 (1932), which stated: " 'That the verdict may have been the result of compromise, or of a mistake on the part of the jury is possible. But verdicts cannot be upset by speculation or inquiry into such matter.' " The *Chamblis* Court then explained, "Juries in criminal cases often find defendants not guilty or find persons who have committed the charged greater offense guilty of only a lesser offense in the face of the evidence for reasons satisfactory to them." *Id.*

[illegible] See, e.g., earlier Court of Appeals opinions: *People v Allen,* 94 Mich App 539; 288 NW2d 451 (1980); *People v Goodchild,* 68 Mich App 226; 242 NW2d 465 (1976); *People v Fields,* 66 Mich App 347; 239 NW2d 372 (1976); *People v Ames,* 60 Mich App 168; 230 NW2d 360 (1975); *People v Willie Johnson,* 58 Mich App 165; 227 NW2d 272 (1975); *People v Phillips,* 43 Mich App 581; 204 NW2d 250 (1972). In light of *Vaughn* and *Lewis,* Justice CAVANAGH improperly relies on *Allen,* which holding is inapposite.

felony and with possession of a firearm during the commission of a felony. The jury acquitted defendants Lewis and Johnson of the underlying felony and convicted them of felony-firearm. The defendants maintained that the verdicts were inconsistent and that their convictions could not stand because they had been acquitted of the underlying felonies and that therefore an element of felony-firearm was not proven.[27]

The Court held that the inconsistent verdicts did not undermine the convictions of felony-firearm. *Id.* at 448. The Court reasoned that "[t]he inconsistency in the instant verdicts suggests that the juries either compromised or were lenient."[28] *Id.* at 450. The Court correctly, and significantly to the present case, stated that if the jury was lenient, the defendant was not injured. Alternatively, if the jury compromised, so that it could not reach a unanimous verdict, the remedy was "not dismissal of the charges, but the declaration of a mistrial, and the defendant can be required to stand trial again on the charges in respect to which the jurors are unable to agree."[29] *Id.* at 452. Despite these decisions, Justice CAVANAGH seems to imply that inconsistent verdicts are not possible in this jurisdiction. *Post* at 484, n 23. Ironically, the majority opinion in *People v Goss (After Remand),* 446 Mich 587, 599; 521 NW2d 312 (1994), held the contrary:

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[27] Specifically, we note that it is legally possible for a jury to return a guilty verdict of second-degree murder and armed robbery, without convicting of first-degree murder. *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981).

In *Miller*, each of the three defendants was charged with one count of first-degree murder and three counts of armed robbery. Defendant Ewing was found guilty of second-degree murder and one count of armed robbery. This Court reversed the convictions for improper jury selection procedures and remanded for new trials.

[28] See *Vaughn, supra* at 466, in which this Court held:

> Juries are not held to any rules of logic nor are they required to explain their decisions. The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Since we are unable to know just how the jurors reached their conclusion, whether the result of compassion or compromise, it is unrealistic to believe that a jury would intend that an acquittal on one count and conviction on another would serve as the reason for defendant's release. These considerations change when a case is tried by a judge sitting without a jury. But we feel that the mercy-dispensing power of the jury may serve to release a defendant from some of the consequences of his act without absolving him of all responsibility.

> We conclude that when an accused is charged with an offense that has as an element commission of a predicate offense the jury's consideration of the charged predicate offense and its consideration of that offense again in the context of a compound offense are separate and distinct. The jury's decision regarding the predicate offense does not preclude it from reaching a different conclusion in the context of the compound offense.

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[29] *People v Goss (After Remand),* 446 Mich 587; 521 NW2d 312 (1994), relied on *Lewis.* In *Goss,* the defendant was convicted of armed robbery and first-degree felony-murder. The conviction of armed robbery was affirmed by this Court, but the felony-murder conviction was reversed because of error in the jury instructions. This Court remanded the case for a new trial for felony-murder. The issue on appeal was whether the defendant was estopped by res judicata and collateral estoppel from relitigating armed robbery on retrial for first-degree murder. This Court held that the defendant was not estopped to relitigate his claim of armed robbery. Although *Goss* involved the presently irrelevant issues of res judicata and collateral estoppel, in an opinion by Justice LEVIN the Court recognized *Lewis* stating, "[t]he jury's decision regarding the predicate offense does not preclude it from reaching a different conclusion in the context of the compound offense." *Id.* at 599.

Although we do not acknowledge a jury's *right* to return inconsistent verdicts, the jury does have the *power* to do so. Therefore, in the present case, while we do not conclude that the jury had the right to return an inconsistent verdict, it may not be contested that if the jury had done so (which we must assume in order to reach the decision of the Court of Appeals), we would not be able to alter that decision. In other words, on the basis of *Lewis, supra,* and *United States v Powell,* 469 US 57; 105 S Ct 471; 83 L Ed 2d 461 (1984), we would not be able to retool the jury's verdict merely because the verdicts were inconsistent.

Yet, Justice **CAVANAGH** proposes an entirely different rule in the present case.

Moreover, it is possible for a jury to reach separate conclusions on an identical element of two different offenses. In *United States v Powell*, 469 US 57; 105 S Ct 471; 83 L Ed 2d 461 (1984), the Court addressed the issue whether an acquittal of a predicate offense would preclude conviction of a compound offense that required proof of the predicate offense. The Court, relying on *Dunn v United States*, 284 US 390; 52 S Ct 189; 76 L Ed 356 (1932), held that "there is no reason to vacate respondent's conviction merely because the verdicts cannot rationally be reconciled." 469 US 69. The Court reasoned that the fact that "inconsistent verdicts may favor the criminal defendant as well as the Government militates against review of such convictions at the defendant's behest. This possibility is a premise of *Dunn*'s alternative rationale—that such inconsistencies often are a product of jury lenity." *Id.* at 65.

The Court of Appeals did not consider the legal possibility of a conviction of second-degree murder and armed robbery where the jury has refused to convict of first-degree murder. Therefore, the Court of Appeals erred in concluding that the jury necessarily found or even considered defendant not guilty of armed robbery.

IV

Finally, we consider defendant's contention that *Harris v Oklahoma*, 433 US 682; 97 S Ct 2912; 53 L Ed 2d 1054 (1977), precludes his retrial of armed robbery. *Harris* involved a defendant who was convicted of felony-murder. The defendant was again brought to trial and convicted on a separate information charging him with robbery with firearms. The defendant moved to dismiss on the ground that the conviction violated the Double Jeopardy Clause. The Court held:

> When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one. "[A] person [who] has been tried and convicted for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence." [*Id.* at 682-683. Citations omitted.]

We find *Harris* clearly distinguishable. *Harris* involved a defendant who was *convicted* and then retried for a lesser-included offense. It did not involve an implied acquittal. *Harris* may only be read to prohibit retrial of a lesser included offense after conviction of the greater offense. *Harris* and its progeny do not even address that part of the Double Jeopardy Clause with which we are presently concerned. *Pearce, supra.*[30]

There is no other way to interpret *Harris*. Even Justice CAVANAGH does not dispute our analysis. Citing *Harris* and *Payne v Virginia*, 468 US 1062; 104 S Ct 3573; 82 L Ed 2d 801 (1984), Justice CAVANAGH states: "[T]he instant defendant could not have received separate sentences for convictions of both first-degree felony murder and of the underlying felony, armed robbery." *Post* at 476. We are not presented with that factual scenario in this case.[31] It has never been maintained that defendant could be *convicted* of first-degree felony murder and subsequently tried and convicted of armed robbery in violation of *Harris* and *Payne*.

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[30] The Supreme Court again visited the issue in *Payne v Virginia*, 468 US 1062; 104 S Ct 3573; 82 L Ed 2d 801 (1984). The defendant challenged his conviction for robbery after he had been convicted of capital murder committed during the perpetration of the robbery. The Court relied on *Harris* and held that the Double Jeopardy Clause prohibited trial of the defendant for the lesser offense of robbery where he had been convicted of the greater crime of murder. The Court stated: "where 'conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery . . . , the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one.' " *Payne, supra* at 1062, citing *Harris*.

V

The essential issue is whether double jeopardy bars retrial of defendant for armed robbery where a jury convicted him of second-degree murder, thereby implicitly acquitting him of first-degree felony murder. Although a case of first impression, we are guided by the rationale of *Green* and its progeny. We would hold that the jury in the present case was not afforded a full opportunity to convict Garcia of armed robbery. Further, we have determined that the jury's verdict *is* inherently ambiguous, given the fact that it was allowed to return only one verdict. Additionally, in its attempt to analyze the jury's verdict, the Court of Appeals failed to consider that this state recognizes a jury's power to render inconsistent verdicts. Defendant therefore was properly retried for the offense of armed robbery. The decision of the Court of Appeals should be reversed.

BOYLE and MALLETT, JJ., concurred with RILEY, J.

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[31] Additionally, whether punishments may be considered multiple is a question of legislative intent. See *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984), holding:

> Under neither the federal nor the Michigan double jeopardy provisions does this Court sit as a superlegislature, instructing the Legislature on what it can make separate crimes.

APPENDIX

VERDICT FORM

THE PEOPLE OF THE
STATE OF MICHIGAN
VS
FRANK GARCIA
________________________/

FILE NO. 5673

Count I - 1st Degree Felony Murder

Possible Verdicts:

You may return only one verdict on this charge. Mark only one box for this count.

☐ Not guilty of 1st degree felony murder
☐ Guilty of 1st degree felony murder

or Guilty of the lesser included offense of:

☑ 2nd degree murder
☐ Armed robbery

Count II - Possession of firearm at time of commission or attempted commission of felony (felony murder).

Possible Verdicts:

You may return only one verdict on this charge. Mark only one box for this count.

☑ Guilty of possession of firearm at time of commission or attempted commission of felony (felony murder).

☐ Not guilty of possession of firearm at time of commission or attempted commission of felony (felony murder).

/s/ Glenn E. Copeland
Jury foreperson

CAVANAGH, J. (*for affirmance*). In this case, we must determine whether the defendant's double jeopardy guarantees under the federal or state constitution have been violated. The defendant was tried for felony murder. The jury convicted him of the lesser-included offense of second-degree murder without expressly acquitting him of felony murder. After the Court of Appeals reversed his conviction, he was separately charged, tried, and convicted of armed robbery, which was based on the identical factual incident that was at issue in the first trial. The Court of Appeals reversed, relying on the double jeopardy doctrine of implied acquittal. I would hold that the collateral estoppel doctrine and the same-transaction test also barred the subsequent trial of the armed robbery count. Therefore, I would affirm the result reached by the Court of Appeals.

I

The procedural history of the instant case is critical to the resolution of the issue presented. The defendant and codefendant Ronald Hammond each were charged by informationf[1] with alternative counts of first-degree felony murder[2] and open murder, and with possession of a firearm during the commission of a felony.[3] The charges were based on a 1985 carjacking and fatal shooting. The prosecution's theory was that during the carjacking the two defendants abducted Timothy Roger Kiley. When Kiley refused to get into the trunk, Hammond shot and killed him.

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[1] The original information was filed following an incident that occurred on or about December 3, 1985, in Caledonia Township, Shiawassee County. Count I charged that the defendant "did, while in the perpetration or attempted perpetration of armed robbery, kill and murder one Timothy Roger Kiley . . . ." Count II charged that the defendant, in the alternative, "did murder Timothy Roger Kiley . . . ." Count III charged that the defendant "did carry or have in his possession a firearm, to-wit: a handgun at the time he committed or attempted to commit a felony, to-wit: murder . . . ."

[2] MCL 750.316; MSA 28.548.

[3] MCL 750.227b; MSA 28.424(2).

Before jury deliberations, the trial court dismissed the count of open murder. The trial court instructed the jury that it could find the defendant guilty or not guilty of first-degree felony murder or guilty of one of the lesser-included offenses of second-degree murder or armed robbery. The trial court also instructed the jury that it could find the defendant guilty or not guilty of felony-firearm. The jury found the defendant guilty of second-degree murder and felony-firearm.[4]

The Court of Appeals reversed the convictions of both counts because the jury instructions and the verdict form did not contain a general verdict of not guilty.[5] The panel further held that because the jury had impliedly acquitted the defendant of first-degree felony murder, he could not be recharged with that offense.[6]

The prosecution issued a new information, charging the defendant with second-degree murder, armed robbery, and felony-firearm.[7] The trial court granted the defendant's motion to quash the armed robbery count, ascertaining that the Court of Appeals decision eliminated the felony-murder count. The trial court further reasoned that in the first trial the defendant had not been separately charged with armed robbery and that when the Court of Appeals eliminated the felony-murder count, it also eliminated the included offense of armed robbery. The trial court then concluded that, by the process of elimination, the only remaining charges were second-degree murder and felony-firearm.

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[4] The trial court sentenced the defendant to life imprisonment and to two years, respectfully. A separate jury convicted codefendant Hammond of first-degree felony murder and felony-firearm. Unpublished opinion per curiam of the Court of Appeals, issued October 19, 1988 (Docket Nos. 94233, 94822).

[5] *Id.*

[6] We denied leave to appeal. 432 Mich 882 (1989). Justices BOYLE and GRIFFIN favored granting leave to appeal.

[7] The charges arose out of the same incident that occurred on or about December 3, 1985, in Caledonia Township, Shiawassee County.

The Court of Appeals peremptorily reversed, reasoning that its previous opinion "does not preclude a new trial on the added count of armed robbery."[8] On retrial, the jury acquitted the defendant of second-degree murder and of felony-firearm, but convicted him of armed robbery.[9]

The defendant appealed. A different panel of the Court of Appeals unanimously reversed the defendant's conviction and remanded for an order discharging him from custody.[10] The panel held that the first jury had impliedly acquitted the defendant of armed robbery when it impliedly acquitted him of first-degree felony murder. The panel then concluded that the second trial of the armed robbery charge violated double jeopardy. We granted leave to appeal.[11]

II

It is essential to our analysis to underscore that the alternate count of open murder did not reach the jury. Therefore, this is *not* a case in which second-degree murder was a lesser-included offense of a murder that arose *independently* of the underlying felony.[12] Moreover, it is critical to emphasize that the defendant was not *separately* charged with armed robbery. Therefore, in the first trial, the *only* way the jury could have convicted the defendant of armed robbery was as a cognate lesser-included offense of first-degree felony murder.[13]

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[8] Unpublished order of the Court of Appeals, entered May 15, 1989 (Docket No. 117306).

[9] The trial court again sentenced the defendant to a life term.

[10] 203 Mich App 420; 513 NW2d 425 (1994).

[11] 446 Mich 865 (1994).

[12] The lead opinion cites *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981), as an example of simultaneous convictions of armed robbery and second-degree murder. First, the defendants in *Miller* were charged with first-degree murder—not first-degree *felony* murder. *Id.* at 322. Therefore, the second-degree murder conviction of one of the defendants was *unrelated* to the independent armed robbery charge. Second, the Court did not address any double jeopardy issues in light of its granting the defendants relief for improper jury selection.

We must therefore consider the significance of the charge that actually was presented to the first jury: first-degree felony murder. In Michigan, the Penal Code differentiates between first-degree and second-degree murder.[14] In *People v Carter,* 395 Mich 434, 437-438; 236 NW2d 500 (1975), this Court summarized the relationship between these two theories:

> Second-degree murder is always a lesser included offense of first-degree murder. First-degree murder is second-degree (common-law) murder

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[13] This Court has held that in determining whether armed robbery is included within a felony-murder count, the issue "is not whether the challenged lesser offense is by definition necessarily included within the greater offense also charged, but whether, on the facts of the case at issue, it is." *People v Jankowski,* 408 Mich 79, 91; 289 NW2d 674 (1980). Therefore, because the instant defendant could not have been convicted of first-degree murder without proof of the armed robbery, armed robbery was a lesser-included offense of the murder count, even though the statute provides that first-degree murder may be based on other theories.

[14] MCL 750.316; MSA 28.548, the first-degree murder statute, provides:

> Murder which is perpetrated by means of poison, lying in wait, or other wilful, deliberate, and premeditated killing, or which is committed in the perpetration, or attempt to perpetrate . . . robbery, . . . is murder of the first degree, and shall be punished by imprisonment for life.

By comparison, MCL 750.317; MSA 28.549, the second-degree murder statute, provides:

> All other kinds of murder shall be murder of the second degree, and shall be punished by imprisonment in the state prison for life, or any term of years, in the discretion of the court trying the same.

> *plus* an element, *viz.*, either premeditation or the perpetration or attempt to perpetrate an enumerated felony. *People v Allen,* 390 Mich 383; 212 NW2d 21 (1973). Conversely, second-degree murder is first-degree murder *minus* premeditation or the enumerated felony.[15]

In *People v Aaron,* 409 Mich 672, 728; 299 NW2d 304 (1981), this Court thoroughly explored the framework of the felony-murder doctrine in Michigan. After abolishing the rule that the mens rea for first-degree felony murder may be satisfied by proof of the intent to commit the underlying felony, the *Aaron* court held that the prosecutor must prove, as "an essential element of any murder," that the defendant acted with malice. The Court further explained:

> Abrogation of this rule does not make irrelevant the fact that a death occurred in the course of a felony. A jury can properly *infer* malice from evidence that a defendant intentionally set in motion a force likely to cause death or great bodily harm. . . . Thus, whenever a killing occurs in the perpetration or attempted perpetration of an inherently dangerous felony, . . . in order to establish malice the jury may consider the "nature of

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[15] In *People v Dykhouse,* 418 Mich 488, 510; 345 NW2d 150 (1984) (CAVANAGH, J., dissenting), I expressed disagreement with the second sentence of the quotation because first-degree murder is a specific intent crime that requires that the defendant must have had an intent to kill, while second-degree murder is a general intent crime that requires malice, which is "(1) an intent to kill, (2) an intent to inflict great bodily harm, or (3) an intent to create, i.e., knowingly creating, a very high risk of death with the knowledge that the act probably will cause death or great bodily harm." I expressly offered no opinion with regard to the relationship between first-degree felony murder and second-degree murder, referring the reader to *People v Aaron,* 409 Mich 728; 299 NW2d 304 (1981). *Dykhouse* at 510, n 14.

Justice BOYLE, in her separate opinion, stated:

> [S]econd-degree murder is first-degree murder minus premeditation or other aggravating circumstance. [*Id.* at 514.]

> the underlying felony and the circumstances surrounding its commission" . . . . *If the jury concludes that malice existed, they can find murder and, if they determine that the murder occurred in the perpetration or attempted perpetration of one of the enumerated felonies, by statute the murder would become first-degree murder.*
>
> The difference is that the jury may not find malice from the intent to commit the underlying felony alone. . . . The prosecution will still be able to prove first-degree murder without proof of premeditation when a homicide is committed with malice, as we have defined it, and the perpetration or attempted perpetration of an enumerated felony is established. Hence, our first-degree murder statute continues to elevate to first-degree murder a *murder* which is committed in the perpetration or attempted perpetration of one of the enumerated felonies. [*Id.* at 729-730. Citations omitted; emphasis added.]

The Court emphasized that the language of the Michigan first-degree murder statute elevates a *murder*—not a *death*—to first degree. *Id.* at 717. A *murder* that is not elevated to first degree is *second-degree* murder.[16]

Significantly, the *Aaron* Court stated:

> We have . . . held that there are lesser included offenses in felony murder and that second-degree murder is a necessarily lesser included offense of first-degree murder. *People v Andrew Carter,* 395 Mich 434; 236 NW2d 500 (1975); *People v Jenkins,* 395 Mich 440; 236 NW2d 503 (1975); *People v Paul,* 395 Mich 444; 236 NW2d 486 (1975). *One obvious reason for this holding is that a jury is always entitled to disbelieve evidence of the felony so that the felony-murder rule would not come into play.* [*Aaron* at 725 (emphasis added) (in the omitted footnote, the Court quoted

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[16] MCL 750.317; MSA 28.549.

the *Carter* definitions of first- and second-degree murder).]

The *Aaron* Court concluded:

> The first-degree murder statute will continue to operate in that all *murder* committed in the perpetration or attempted perpetration of the enumerated felonies will be elevated to first-degree murder. [*Id.* at 734.]

In the instant case, because the defendant was not separately charged in the first trial with armed robbery, he was only in jeopardy of a conviction of armed robbery as a lesser-included offense of the felony-murder count. Even though the jury heard evidence of the facts supporting the prosecution's theory of armed robbery, and was separately instructed on the lesser-included offense of armed robbery, it did not express any specific verdict with regard to armed robbery. The prosecution did not object to the failure of the jury to render a specific verdict. Therefore, the issue is whether the prosecution could subsequently try the defendant for armed robbery on the basis of the same underlying facts.

III

The federal and the Michigan Constitutions both provide that no person in criminal prosecutions shall be subject to double jeopardy.[17] In *North Carolina v Pearce,* 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969), the United States Supreme Court held that the Double Jeopardy Clause guarantees three distinct constitutional safeguards:

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[17] US Const, Am V; Const 1963, art 1, § 15. The Fifth Amendment Double Jeopardy Clause applies to the states through the Fourteenth Amendment. *Benton v Maryland,* 395 US 784, 787; 89 S Ct 2056; 23 L Ed 2d 707 (1969).

> It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.

The clause includes a collateral estoppel guarantee. *Ashe v Swenson,* 397 US 436; 90 S Ct 1189; 25 L Ed 2d 469 (1970).

The instant case implicates the federal Double Jeopardy Clause strands of collateral estoppel and of multiple prosecution after acquittal. Further, the Michigan same-transaction test is also implicated.

Even though the federal and state constitutions both provide a guarantee against double jeopardy, Michigan jurisprudence often takes a slightly different approach than its counterpart federal. In *People v Wilder,* 411 Mich 328, 348, n 10; 308 NW2d 112 (1981), this Court explained the differences that are significant to the instant case:

> Some confusion may exist over the use of various tests to establish a double jeopardy violation in Federal and state courts. Basically, there are few significant variances between the Federal test and our own. However, some differences do exist and should be noted.
>
> For instance, Michigan has adopted a distinct constitutional position from the Federal courts as pertains to questions of multiple prosecution. See *North Carolina v Pearce,* 395 US 711, 717; 89 S Ct 2072; 23 L Ed 2d 656 (1969). In this regard, Michigan has implemented the minority position espoused in Justice Brennan's "same transaction" analysis in *Ashe v Swenson,* 397 US 436, 453-454; 90 S Ct 1189; 25 L Ed 2d 469 (1970) (Brennan, J., concurring). The rule in Michigan as to multiple prosecution is that all crimes arising from the same transaction must be prosecuted in a single

> proceeding, except under closely circumscribed conditions. See *People v White*, 390 Mich 245; 212 NW2d 222 (1973). The test we employ in this instance is slightly more protective of defendant's double jeopardy right than the collateral estoppel analysis used by a majority of the Federal Court in *Ashe*.

Clearly, under the multiple punishment strand of double jeopardy, the instant defendant could not have received separate sentences for convictions of both first-degree felony murder and of the underlying felony, armed robbery. *Wilder, supra* at 342. See *Payne v Virginia*, 468 US 1062; 104 S Ct 3573; 82 L Ed 2d 801 (1984); *Harris v Oklahoma*, 433 US 682, 682; 97 S Ct 2912; 53 L Ed 2d 1054 (1977); *People v Harding*, 443 Mich 693, 712; 506 NW2d 482 (1993). Further, after his conviction of second-degree murder, the defendant could not be retried for first-degree murder under the implied acquittal doctrine. *Green v United States*, 355 US 184, 190; 78 S Ct 221; 2 L Ed 2d 199 (1957).[18] The *Green*

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[18] In *Green*, the defendant was separately indicted for arson and first-degree murder. *Id.* at 185. The jury convicted him of arson and second-degree murder. The verdict was silent with regard to first-degree murder. After a successful appeal of the second-degree murder conviction, the defendant was convicted of first-degree murder. The Court held that the defendant had been implicitly acquitted of first-degree murder by his conviction of the lesser-included offense of second-degree murder. The Court explained:

> Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. When given the choice between finding him guilty of either first or second degree murder it chose the latter. . . . [T]he jury was dismissed without returning any express verdict on that charge and without Green's consent. Yet it was given a full opportunity to return a verdict and no extraordinary circumstances appeared which prevented it from doing so. Therefore, it seems clear, under established principles of former jeopardy, that Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense. [*Id.* at 190-191. Citation omitted.]

Court explained the rationale of the Double Jeopardy Clause:

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. [*Id.* at 187-188.]

I will now consider the strands of double jeopardy that I believe are implicated in the case at bar.

IV

Collateral estoppel is included within the double jeopardy guarantee. *Ashe, supra* at 445. *Ashe* held that collateral estoppel is "a matter of constitutional fact [that the court] must decide through an examination of the entire record." *Id.* at 443. The Court explained its definition:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. [*Id.*]

The Court rejected a "hypertechnical" approach to its application, and instead called for a realistic and rational approach:

> Where a previous judgment of acquittal was

> based upon a general verdict, as is usually the case, this approach requires a court to "examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." [*Id.* at 444. Citation omitted.]

In *Ashe,* the Court held that after a jury had acquitted the defendant of robbing one of the players at a poker game, the state could not prosecute the defendant for robbing another player at the same poker game because the jury had determined that "there was at least a reasonable doubt that the petitioner [defendant] was one of the robbers . . . ." *Id.* at 446.

In *Turner v Arkansas,* 407 US 366; 92 S Ct 2096; 32 L Ed 2d 798 (1972), the defendant received a general verdict of acquittal for a murder arising out of a robbery.[19] *Id.* at 367. He was then indicted for the same robbery. The parties stipulated that "the evidence the State would present on the robbery charge would be identical with that it introduced on the murder charge." *Id.* at 368. The Court relied on the *Ashe* collateral estoppel doctrine. After making a thorough examination of the entire record, the *Turner* Court reasoned:

> [P]etitioner was not charged with robbery at the first trial, but the State has stipulated that the robbery and murder arose out of "the same set of facts, circumstances, and the same occasion." The crucial question, therefore, is what issues a general verdict of acquittal at the murder trial re-

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[19] The defendant had been involved in a poker game with the victim, Larry Wayne Yates, and with another player, Richard Turner. After the defendant had left the game, the victim was murdered and robbed. *Id.* at 366.

> solved. The jury was instructed that it must find petitioner guilty of first-degree murder if it found that he had killed the decedent Yates either with premeditation or unintentionally during the course of a robbery. The jury's verdict thus necessarily means that it found petitioner not guilty of the killing. The State's theory, however, is that the jury might have believed that petitioner and Richard Turner robbed Yates, but that Richard actually committed the murder. This theory is belied by the actual instructions given the jury. The trial judge charged that:
>
> "An accessory is one who stands by, aids, abets, or assists . . . the perpetration of the crime.
>
> * * *
>
> "All persons being present, aiding and abetting, or ready and consenting to aid and abet, in any felony, shall be deemed principal offenders, and indicted or informed against, and punished as such." . . .
>
> Had the jury found petitioner present at the crime scene, it would have been obligated to return a verdict of guilty of murder even if it believed that he had not actually pulled the trigger. The only logical conclusion is that the jury found him not present at the scene of the murder and robbery, a finding that negates the possibility of a constitutionally valid conviction for the robbery of Yates. [*Id.* at 368-369.]

Collateral estoppel "is and has been directed at barring a reprosecution directly based on relitigating findings of ultimate fact permissibly, though not necessarily, drawn from that evidence . . . ." *Pugliese v Perrin*, 567 F Supp 1337, 1343 (D NH, 1983) (citation omitted). Moreover, "the Double Jeopardy Clause precludes relitigation of *any* issue of ultimate fact finally determined by a valid judgment of acquittal." *Id.* at 1341, citing *Ashe, supra* at 443, and *Turner* (emphasis added). Under

Green, I believe that "acquittal" would extend to a judgment of implied acquittal.

Ashe and *Turner* direct us to examine the entire record. My examination of the instant record reveals that both informations arose from the same carjacking, which occurred on or about December 3, 1985, in Caledonia Township, Shiawassee County, involving the robbery and death of Timothy Roger Kiley. My examination of the record also reveals that both juries received substantially similar jury instructions.

In the first trial, the trial court instructed the jury:

> Now, it is charged in this case that Frank Garcia either directly committed the crime—the crimes charged; that is, First-Degree Felony Murder, or the second count of Felony Firearm. Or that he intentionally aided or assisted another person in the commission of those crimes.
>
> All persons who aid or assist in the commission of a crime are as liable as if they had directly committed the crime and may be convicted of the principal offense or as an aider and abettor.
>
> * * *
>
> Now, you are concerned in this case with basically two degrees of murder as it relates to the charge of Felony Murder. And the degrees I'm talking about are First Degree Felony Murder or Second Degree Murder.
>
> You will first be instructed on murder in the second degree, because all of the elements of second degree are also contained as elements of first degree murder.
>
> The difference between first degree murder—excuse me, between first degree felony murder and second degree murder is that for second degree murder, the Defendant Frank Garcia need not have been committing or attempting to commit or assisting another in the commission of the crime

> of armed robbery at the time which caused Mr. Timothy Kiley's death.
>
> If you find the Defendant guilty of Murder, it is your duty to state the degree in your verdict; that is, he's guilty of first degree felony murder or guilty of second degree murder.[30]

The trial court then gave nearly identical instructions regarding the elements of second-degree murder and first-degree felony murder, adding that the jury also must find that the defendant committed or attempted to commit or was assisting his codefendant in committing the crime of armed robbery.[31] The trial court then instructed the jury with regard to the elements of armed robbery.[22]

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[30] The trial court instructed the jury on the elements of second-degree murder:

> As I've already indicated to you, second degree murder is a necessarily lesser included offense within first degree felony murder. To establish second degree murder, the prosecution must prove each of the following elements beyond a reasonable doubt.
>
> Number one, that the deceased Timothy Roger Kiley died on or about December 3, 1985, within the County of Shiawassee, State of Michigan.
>
> Number two, that Timothy Roger Kiley's death was caused by the Defendant; that is, that Timothy Kiley died as a result of a bullet wound to the head.
>
> Number three, that if you find the death was caused by the Defendant, you must determine whether the Defendant is guilty of any . . . crime.
>
> • • •
>
> The fo[u]rth element that the prosecution must prove beyond a reasonable doubt for second degree murder is that for second degree murder, you must find that the Defendant, Mr. Frank Garcia, acted with a certain state of mind in causing the death of Timothy Kiley. You must find that the Defendant Frank Garcia intended to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result of his act.

[31] The trial court gave the following first-degree felony murder instructions:

> Number one. First, that Mr. Timothy Kiley died on or about, again, December 3, 1985, in Shiawassee County, Michigan.

> Number two, that his death was caused by the Defendant; that is, that Timothy Roger Kiley died as a result of a bullet wound to the head.
>
> Number three, that if you find the death was caused by the Defendant Frank Garcia, you must determine whether the Defendant is guilty of any crime.
>
> * * *
>
> The fo[u]rth element of first degree felony murder which the prosecution must prove beyond a reasonable doubt is that for first degree felony murder, you must find proof beyond a reasonable doubt that the Defendant acted with a certain state of mind in causing the death of Timothy Roger Kiley. You must find the Defendant possessed the following state of mind at the time of the killing.
>
> That the defendant Frank Garcia intended to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result of the act of robbery armed.
>
> *Fifth, that at the time of the act which caused the death of Timothy Roger Kiley, the Defendant was committing or attempting to commit or assisting another in the commission of the crime of robbery armed.* [Emphasis added.]

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[22] The trial court stated:

> So, the elements of robbery armed are as follows.
>
> That the Defendant, Mr. Frank Garcia, assaulted Timothy Kiley. And there are two ways to commit an assault. The Defendant must have attempted or threatened to do an immediate bodily harm to the victim while possessing the intent and present ability to injure. Or the Defendant must have committed a forceful act that placed the victim in reasonable fear of immediate bodily harm while intending to put the victim in such fear.
>
> Secondly, that at the time of such assault, the Defendant was armed with a dangerous weapon. . . .
>
> [T]hird, that at the time of such assault, the Defendant took the money or property alleged to have been taken; that is, money or property which did not belong to the Defendant.
>
> Fo[u]rth, that this money or property was taken from the person or in the presence of the victim Timothy Kiley. . . .
>
> The next element is that the property taken must have been of some value, but the extent of the value makes no difference. . . .
>
> Six, there must have been some movement of the property in order to make the crime complete. . . .
>
> Seven, at the time of the taking, the Defendant must have

Moreover, the trial court again emphasized the difference between felony murder and second-degree murder:

> [W]hat makes second degree murder rise to the level of, in this case, first degree felony murder is this added element necessary for first degree felony murder; that the Defendant, Mr. Garcia, *was committing or attempting to commit a felony; that is, armed robbery,* at the time of the act that caused the victim, Mr. Timothy Roger Kiley's death. [Emphasis added.]

At the close of the jury instructions, the trial court asked counsel if either had any objections to the instructions. Both answered that they had no objections.

Ashe instructs us to find that the first jury's judgment, as it pertained to the armed robbery element, was a valid and final judgment. *Id.* at 443. I believe that verdict was final, especially in view of the fact that neither party objected to the verdict before the jury was dismissed. I also believe that the verdict was valid in that the jury, after hearing all of the evidence and after being instructed on all the elements of felony murder, second-degree murder, and armed robbery, rendered a verdict that followed the instructions it was given. The jury, with full opportunity to do so, chose not to find the defendant guilty of felony murder, but guilty of second-degree murder. The jury, which was carefully instructed that the only difference between second-degree murder and felony murder was the aggravating circumstance of armed robbery, found the defendant guilty only of second-degree murder. The instructional error that

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intended to permanently deprive Timothy Roger Kiley of the property taken.

led to reversal, i.e., that the jury verdict form did not contain a specific general verdict of acquittal, favored the prosecution.[22]

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[22] Arguably, the jury had the full opportunity to acquit the defendant of all charges by marking the box for not guilty of felony murder. More importantly, I would argue that where second-degree murder is presented to the jury *only* as a lesser-included offense of felony murder, and where the jury is properly instructed that the only difference between second-degree murder and felony murder is the underlying felony, *Aaron* would compel us to find that the defendant simultaneously could not be convicted of second-degree murder and of the underlying felony without violating the Legislature's clear mandate that a murder committed during an armed robbery is first-degree murder. MCL 750.316; MSA 28.548.

In *Wilder*, this Court stated:

> Whether an offense is a logically included or legislatively included offense, the offense is the "same" offense for double jeopardy purposes under *Blockburger v United States*, 284 US 299; 52 S Ct 180; 76 L Ed 306 (1932). See *Wayne Co Prosecutor v Recorder's Court Judge*, 406 Mich 374, 406-407; 280 NW2d 793 (1979) (KAVANAGH, J., dissenting), app dis sub nom *Brintley v Michigan*, 444 US 948; 100 S Ct 418; 62 L Ed 2d 317 (1979). First-degree felony murder requires proof of the underlying felony. See *Whalen v United States*, 445 US 684; 100 S Ct 1432; 63 L Ed 2d 715 (1980). Nor does this suggested approach alter the analysis under our state constitutional prohibition against double jeopardy. The legislatively determined lesser included offense, the underlying felony, is a necessary prerequisite to a first-degree felony-murder conviction and, on the facts of this case, renders them the "same" offense. [*Wilder, supra* at 342, n 6.]

The Court continued:

> Under Michigan authority, the fact that the elements of first-degree felony murder do not in every instance require or include the elements of armed robbery does not mean the offense of armed robbery is not necessarily included in the felony murder here. It is recognized that the underlying felony might be characterized as a cognate lesser included offense, not a necessarily included offense. See *State v Thompson*, 280 NC 202, 215-216; 185 SE2d 666, 675 (1972). Though theoretically arguable, such a position is irrelevant when the legal analysis depends not upon the theoretical elements of the offense but upon proof of facts actually adduced. We stated in *People v Jankowski* [n 13 *supra* at] 91:
>
> "For purposes of the double jeopardy analysis, as a matter of state constitutional law, the question is not whether the challenged lesser offense is by definition necessarily included within

Ashe further directs us to determine whether a rational jury could have grounded its verdict on an issue other than the failure to prove beyond a reasonable doubt that the instant defendant was guilty of armed robbery. See *id.* at 444. Under *Aaron,* if the jury had found the defendant guilty of murder, i.e., second-degree murder, *and* guilty of the underlying felony, armed robbery, then the first-degree murder *statute* would have elevated the *murder* to first-degree felony murder. *Id.* at 730. The first jury determined that all the elements of *murder* had been proven beyond a reasonable doubt when it convicted the defendant of second-degree murder. If the jury had also determined that the prosecutor had proven beyond a reasonable doubt that the defendant was guilty of armed robbery, it was *obligated* by the jury instructions to return a verdict of guilty of first-degree felony murder. Therefore, the reasonable conclusion is that the jury found that at least one of the elements of armed robbery was not proven beyond a reasonable doubt. As directed by *Turner,* I would conclude that the issue whether the defen-

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> the greater offense also charged, but whether, on the facts of the case at issue, it is." [*Wilder, supra* at 345-346.]

Therefore, armed robbery was a lesser-included offense of felony murder. On the facts of the case at issue, I would further argue that the second-degree murder offense is the "same" offense as the armed robbery offense where, but for the armed robbery, the jury would not even have been instructed on the second-degree murder count. But for the underlying felony, no murder count would have reached the jury. Therefore, where the jury instructions, which complied with *Aaron,* obligated the jury to return a verdict of guilty of felony murder if it found the defendant guilty of murder and guilty of armed robbery, I believe that under the first-degree murder statute, the jury could *not* have returned separate verdicts of guilty of second-degree murder and guilty of armed robbery. Under the facts before it, the jury instructions would have obligated the jury to return the verdict of guilty of felony murder. Where the Legislature has determined a single punishment for felony murder, I would argue that imposing simultaneous sentences for second-degree murder and for armed robbery would violate the multiple punishment strand of double jeopardy.

dant was guilty of armed robbery was resolved by the first jury.

We must continue and examine the second trial to determine whether the same facts and theory of armed robbery were improperly presented to the second jury. At the second trial, the trial court instructed the jury with regard to the counts in the information.[34] The court also gave a specific instruction with regard to the elements of armed robbery.[35] Again, the prosecutor did not object to the instructions given.

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[34] The court stated that the information charged:

> [I]n Count II, that the defendant, Frank Garcia, did assault a certain person, to-wit: Timothy Rogers [sic] Kiley, while being armed with a dangerous weapon or an article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, to-wit: a handgun, and did then and there feloniously rob, steal and take from the person of said victim or in his presence certain property, to-wit: an automobile, contrary to the laws made and provided for in this State of Michigan.

[35] The trial court instructed the jury:

> To establish this charge [of armed robbery], the prosecution must prove each of the following elements beyond a reasonable doubt:
>
> Number one, that the defendant assaulted Timothy Kiley. . . .
>
> Second, the second element is that at the time of the assault, the defendant was armed with a weapon designed to be dangerous and capable of causing death or a serious bodily harm.
>
> The third element of armed robbery is that at the time of such assault, the defendant took the automobile alleged to have been taken which did not belong to the defendant.
>
> The fourth element of armed robbery is that this automobile was taken from the person or in the presence of Timothy Kiley. . . .
>
> The fifth element of armed robbery is that the automobile taken must have been of some value but the extent of the value makes no difference.
>
> The sixth element of armed robbery is that there must have been some movement of the automobile in order to make the crime complete. . . .
>
> A seventh element of armed robbery is that at the time of the taking, the defendant must have intended to permanently deprive Timothy Kiley of the automobile taken.

I believe that the factual basis of the armed robbery charge at the second trial was identical to the factual basis of the armed robbery element of felony murder that was produced at the first trial. Because the first jury resolved the issue of guilt regarding the armed robbery theory in the defendant's favor, the collateral estoppel doctrine barred relitigation of those issues at the second trial.

V

This Court has adopted the "same transaction" test, which is even broader than the federal collateral estoppel rule. *White, supra.*[38] The Court explained:

> The use of the same transaction test in Michigan will promote the best interests of justice and sound judicial administration. In a time of overcrowded criminal dockets, prosecutors and judges should attempt to bring to trial a defendant as expeditiously and economically as possible. A far more basic reason for adopting the same transac-

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[38] Justice Brennan's concurring opinion in *Ashe,* argued that the same-transaction test was the best test to fulfill the guarantee of the Double Jeopardy Clause. *Id.* at 252. The *White* majority quoted from Justice Brennan's opinion:

> "In my view, the Double Jeopardy Clause requires the prosecution, except in most limited circumstances, to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction. This 'same transaction' test of 'same offence' not only enforces the ancient prohibition against vexatious multiple prosecutions embodied in the Double Jeopardy Clause, but responds as well to the increasingly widespread recognition that the consolidation in one lawsuit of all issues arising out of a single transaction or occurrence best promotes justice, economy, and convenience." [*Id.* at 254, quoting *Ashe, supra* at 454 (Brennan, J., concurring).]

> tion test is to prevent harassment of a defendant. The joining of all charges arising out of the same criminal episode at one trial ". . . will enable a defendant to consider the matter closed and save the costs of redundant litigation." It will also help ". . . to equalize the adversary capabilities of grossly unequal litigants" and prevent prosecutorial sentence shopping. "In doing so, it recognizes that the prohibition of double jeopardy is for the defendant's protection." 41 Mich App 370, 378; 200 NW2d 326, 330 (1972).
>
> In Michigan, the equivalent of the same transaction test has long been the standard applied to civil actions through GCR 1963, 203.1 and the doctrines of collateral estoppel and res judicata. The purposes behind requiring a plaintiff to raise in one action all of his claims against a defendant that arose out of the same transaction are to conserve the state's judicial resources and to prevent harassment of the defending party. *People v Noth,* 33 Mich App 18, 40; 189 NW2d 779, 789 (1971) (LEVIN, J., dissenting). "One would think that standards as high as those applied in civil litigation . . . would be applied without hesitation in the enforcement of the constitutional right of the citizen secured by the Double Jeopardy Clause in the Bill of Rights." *Id.* [*White, supra* at 258-259.]

White cautioned that situations may arise in which the same-transaction test should yield if the application of the rule would not serve the objective of meaningful protection for the defendant against double jeopardy, giving examples of crimes that were not yet completed, or not yet discovered, in spite of due diligence by the police. *Id.* at 258, n 6.[27] In the instant case, the armed robbery crime

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[27] A similar approach was taken in *Webster v State,* 549 So 2d 784 (Fla App, 1989). The court reversed a felony-murder conviction because of insufficient evidence. The court also barred reprosecution for lesser-included offenses:

> [B]ecause of an insufficiency of the evidence, appellant cannot

was fully completed and discovered at the time that the first information was prepared. Therefore, I find no reason to fit this case within the *White* exception. The prosecution, for whatever reason, chose not to separately charge the defendant with armed robbery.

Once the jury impliedly acquitted the defendant of first-degree murder, that charge essentially disappeared—except for the lesser-included offense of which the defendant was actually convicted, second-degree murder.[28] Because armed robbery is not a lesser-included offense of second-degree murder, there was no remaining theory from the first trial that would support a conviction of armed robbery. Because the prosecution did not join the armed robbery charge with the murder charges that arose "out of the same criminal episode"[29] in the first information, it violated the same-transaction test when it brought the subsequent armed robbery charge at the second trial.

VI

In the case at bar, the Court of Appeals ex-

> be re-tried upon the same charge of second-degree felony murder because of double jeopardy considerations. . . . Nor can he be retried on any lesser included offenses if the jury was not charged upon those lesser included offenses. *Bean v State*, 469 So 2d 768 (Fla App, 1984). As a general rule, a defendant may be retried on lesser offenses after a reversal of the conviction on the greater offense if all of the constituent essential elements of the lesser offense are not included within the elements of the greater offense. *Bell v State*, 437 So 2d 1057 (Fla, 1983). [*Webster, supra* at 784-785.]

[28] The defendant who successfully appeals a conviction, on any grounds other than insufficient evidence, is generally held to have waived his double jeopardy protection *with respect to that conviction*. The defendant does not waive double jeopardy guarantees with respect to those offenses for which he has been acquitted or impliedly acquitted. *Green, supra* at 192-194.

[29] *White, supra* at 259.

tended the implied acquittal doctrine to a lesser-included offense of felony murder. It reasoned:

> In the original prosecution for felony murder, armed robbery was the underlying felony. It is clear that proof of that felony murder assumes proof of each element of armed robbery. Had the defendant been convicted of felony murder, which was later reversed, then, a second trial for armed robbery would not have been precluded under *Payne.* The relationship between armed robbery and second-degree murder is altogether different, however. Proof of second-degree murder does not require proof of an underlying offense. Under the rule of *Payne,* conviction of second-degree murder does not ipso facto operate to bar a second prosecution for armed robbery. But another step is necessary in the analysis. In this case, the only difference between second-degree murder and felony murder is the concurrent commission of armed robbery to elevate second-degree to first-degree. See *People v Aaron,* 409 Mich 672, 719, 730; 299 NW2d 304 (1980). The first jury found a murder had been committed, but it did not find an armed robbery had been committed sufficient to elevate its verdict to first-degree murder. Simply put, the jury did not find an armed robbery or its verdict would have been guilty of felony murder. *Aaron, supra* at 725. Thus, the jury's acquittal with regard to the felony-murder charge, by implication, served to acquit the defendant of armed robbery. By subtracting the elements of the convicted offense of second-degree murder from the acquitted offense of felony murder, that the jury also found insufficient proof of armed robbery is ineluctable. Thus, the defendant stood acquitted of armed robbery after the first trial. His retrial on that charge violated the principles of double jeopardy under *Payne.* [203 Mich 420, 425-426; 513 NW2d 425 (1994).]

I would adopt this analysis. In a pre-*Aaron* Court of Appeals case, Justice RILEY used a similar analysis and reached the same result. *People v Allen,* 94 Mich App 539, 545; 288 NW2d 451 (1980). In that case, the defendant *was* separately charged with felony murder and with armed robbery. He was convicted of second-degree murder and of armed robbery. A majority of the panel vacated the armed robbery conviction on double jeopardy grounds.[30] Justice RILEY reasoned:

> Felony murder, with which defendant was originally charged, is second-degree murder plus the additional element of committing, or attempting to commit, an enumerated felony. . . . Thus, if a first-degree murder verdict is to be returned, the homicide must be found to have occurred during the course of the felony. . . .
>
> It is clear from the instant record that the murder took place during the time that defendant asked for and received money, there being conflicting testimony as to whether it was *his* money, and thus, not robbery. . . . It is inescapable then, that in finding defendant not guilty of felony murder, while convicting him of second-degree murder, the jury must have also concluded that no robbery occurred at the time of the homicide. . . . Therefore, I conclude that defendant's conviction for armed robbery must be vacated. [*Id.* at 545.][31]

The instant case is distinguishable from the situation that arose in *People v Rosario,* 166 Ill App 3d 383, 385; 519 NE2d 1020 (1988). There, the defendant was charged separately with felony murder and with the underlying felony, arson.[32] The jury acquitted him of all murder counts, but deadlocked on the arson counts. He was retried and convicted of arson. The court affirmed the conviction, determining that felony murder required an additional element beyond the elements of arson. *Id.* at 389. It reasoned that an acquittal on the greater charge did not necessarily imply an acquittal on the lesser charge. The case at bar presents a different situation because the *Garcia* jury *did* convict the defendant of murder and because Garcia was not separately charged with armed robbery in the first trial.

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[30] Concurring, Judge KAUFMAN used a same-elements approach. *Id.* at 546-547.

[31] Justice RILEY continued and stated that *trying* a defendant for both the felony and the underlying felony would violate the double jeopardy guarantee. *Id.* at 545-546. She later reaffirmed her position in *People v Ferrell,* 99 Mich App 609, 612; 299 NW2d 366 (1980) (RILEY, J., concurring): "[P]rosecution for felony murder and armed robbery presents a valid double-jeopardy claim." Another panel questioned her approach and argued that the Double Jeopardy Clause applies to *convictions,* not simply alternative counts within one proceeding. *People v Gibbs,* 120 Mich App 485, 494; 328 NW2d 65 (1982) (emphasis supplied).

VII

The lead opinion contends that the first jury did not have a full opportunity to *convict* the defendant,[33] allegedly because it did not have a "choice." RILEY, J., *ante* at 451. I disagree. As instructed, the jury certainly had ample choices: it could find the defendant guilty of murder and mark the box for guilty of second-degree murder; alternatively, it could find the defendant guilty of armed robbery and mark the box for guilty of armed robbery; it could find the defendant guilty of both murder and armed robbery and mark the box for guilty of felony murder; and finally, it could find the defendant not guilty of either murder or armed robbery and mark the box for not guilty of felony murder. Additionally, as I have already discussed, I find no "extraordinary circumstance" that prevented the first jury from *convicting* the defendant of armed robbery. In fact, it had *two* opportunities. Moreover, under Justice RILEY's approach in *People v Allen,* and as discussed above under my reading of *Wilder* and *Aaron,* the defendant could *not* have been separately sentenced for convictions of both second-degree murder and armed robbery. Therefore, there was no error that prevented conviction.

---

[32] The defendant initially was charged with multiple counts of murder, arson, and aggravated arson for a fire that killed a young child.

[33] The lead opinion relies on *Potts v State*, 258 Ga 430; 369 SE2d 746 (1988). In *Potts*, the jury instructions and the verdict form presented the charge of kidnapping, they did not mention the count that was actually charged: kidnapping with bodily injury. *Id.* at 432-433. The *Potts* court held that the verdict of guilty of that count was opaque. *Id.* The case is readily distinguishable from the instant case, where the jury instructions and verdict form specifically addressed the charge of armed robbery.

The discussion in the lead opinion of *Johnson v Commonwealth,* 221 Va 736; 273 SE2d 784 (1981), is incomplete. It states that the *Johnson* jury "did not resolve the issue of the defendant's guilt because, in order to convict the defendant of armed robbery, it would have had to ignore the court's instructions." RILEY, J., *ante* at 453. The lead opinion extends this finding to the instant case and states that the instant jury "was precluded from determining defendant's guilt or innocence with regard to armed robbery." *Id.* at 453-454. What the lead opinion has failed to provide is a complete picture of the jury instructions in *Johnson.* There, the defendant was separately charged in three counts of what would be the corresponding theories in our state of felony murder, robbery, and felony-firearm.[34] The trial court instructed the jury that *if* it found the defendant guilty of felony murder, it *must* return a verdict of not guilty on the robbery count. *Id.* at 738. However, in order to find the defendant guilty of felony murder, the jury had to find him guilty of the underlying felony of robbery. Therefore, the jury instructions were merely an attempt to avoid multiple convictions of the same offense. The *Johnson* court properly concluded that the jury in fact had found the defendant guilty of robbery because it followed the jury instructions and found the defendant guilty of the felony-murder count. *Johnson* has no application to the instant case, where the defendant was *not* convicted of felony murder.

---

[34] The Virginia statutes were capital murder, robbery, and use of a dangerous weapon.

The lead opinion seems to argue that there is no such doctrine of implied acquittal. Riley, J., *ante* at 454. It argues that an implicit acquittal requires a "clear and articulable decision of guilt . . . or innocence . . . ." *Id.* My response is that if the decision is clear and articulable it is *not* an implicit decision—it is an express decision. The whole point of *Green* was to allow common-sense reasoning in interpreting jury verdicts that are not explicit.[36]

Further, the lead opinion would have it both ways: it argues that an appellate court "may not speculate regarding a jury's conclusions." Riley, J., *ante* at 460, n 25. Yet, that is exactly what the lead opinion is doing—speculating. I am certainly not persuaded by its surmise that the jury *may* have rejected felony murder out of an "exercise of lenity." *Id.* at 452. *If* we are going to speculate, I would argue that it is more reasonable to conclude that if the jury wanted to be *lenient,* it could have convicted the defendant of the crime that he allegedly was actually participating in, which was the armed robbery, rather than the more severe crime that he was only vicariously in jeopardy of committing, which was the murder.

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[36] The lead opinion cites *Edmonds v United States,* 106 US App DC 373, 379; 273 F2d 108 (1959). There, the defendant was retried *only* on the charge for which he was actually convicted. There is absolutely no contention in the instant case that Garcia could not have been retried for second-degree murder.

The lead opinion also relies on *United States v Gooday,* 714 F2d 80 (CA 9, 1983). There, the court relied on the notice purpose of an indictment. It reasoned that notice extends to the lesser-included offenses that are actually presented to the jury. It concluded that "lesser included offenses should be treated as if they had been specified in separate counts of the indictment." *Id.* at 83. *Gooday* should not apply to cases where collateral estoppel bars retrial.

The lead opinion goes to great lengths to discuss inconsistent verdicts, but has not explained to me how the jury verdict in this case was inconsistent. The lead opinion relegates to a footnote the precedent-setting *Aaron* case. *Id.* at 460, n 25. The lead opinion rests its conclusion on its determination that the verdict was "inherently ambiguous." *Id.* at 466. Yet it has not explained how *Aaron,* and specifically how the actual jury instructions that were given in this case, do not support the verdict that the jury rendered. See *Aaron, supra* at 725. This verdict was anything but ambiguous. We should not speculate with regard to why the jury did not want to convict the defendant of felony murder. We can only read the entire record and determine what the jury did in fact do. The jury followed the instructions that were given to it, and it found one of the elements of felony murder missing. It did find the defendant guilty of murder.[36] The only difference between murder and felony murder that the jury was aware of was the felony. Common sense should lead us to a commonsense conclusion.

VIII

In conclusion I would find that the defendant's double jeopardy guarantee was violated when he was twice placed in jeopardy of the offense of armed robbery. I would affirm the decision of the Court of Appeals.

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[36] The discussion in the lead opinion of *People v Goss (After Remand),* 446 Mich 587; 521 NW2d 312 (1994), is also illusive. There, we held that collateral estoppel could not be invoked against a defendant who was *convicted* of an essential element of the compound offense. *Id.* at 599, 610. In the instant case, the defendant was neither convicted, nor impliedly found guilty, of the essential element of armed robbery.

Levin, J., concurred with Cavanagh, J.

Brickley, C.J. (*for affirmance*). The lead opinion concludes that the doctrine of collateral estoppel does not apply in this case, reasoning that the jury did not render a final verdict regarding defendant's armed robbery charge in his first trial. I believe that the doctrine of collateral estoppel is fully applicable in this case and requires reversal of defendant's conviction of armed robbery. While I concur with the collateral estoppel analysis of Justice Cavanagh, I write separately to express my view that a reviewing court should assume a rational jury in applying the doctrine of collateral estoppel.

The Double Jeopardy Clause is an explicit provision of the United States and Michigan Constitutions. In analyzing questions of double jeopardy, one must bear in mind what is said to be "fundamental" to the Double Jeopardy Clause: the constitutional right of a defendant not to be further prosecuted following a jury verdict of not guilty. *United States v Martin Linen Supply Co,* 430 US 564, 571; 97 S Ct 1349; 51 L Ed 2d 642 (1977). This rule is absolute, *Burks v United States,* 437 US 1, 16; 98 S Ct 2141; 57 L Ed 2d 1 (1978), and therefore criminal defendants cannot be further prosecuted following an acquittal.

At issue in this appeal is whether defendant was acquitted of armed robbery in his first trial. The lead opinion unnecessarily confuses the doctrines of implied acquittal and collateral estoppel in its discussion of the latter, thereby clouding its analysis of this issue. See *ante* at 458. While both doctrines are a part of double jeopardy, they require distinct analyses. In *Ashe v Swenson,* 397 US 436; 90 S Ct 1189; 25 L Ed 2d 469 (1970), the United States Supreme Court defined collateral estoppel and concluded that the Double Jeopardy Clause encompasses the concept of issue preclusion:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and full judgment, that issue cannot again be litigated between the same parties in any future lawsuit.
>
> * * *
>
> The ultimate question to be determined, then, . . . is whether this established rule of federal law is embodied in the Fifth Amendment guarantee against double jeopardy. We do not hesitate to hold that it is. For whatever else that constitutional guarantee may embrace, it surely protects a man who has been acquitted from having to "run the gantlet" a second time. [*Id.* at 443, 445-446. Citations omitted.]

Ashe requires that an appellate court determine, after a thorough search of the trial record, what issues a jury *must* have decided in reaching its verdict. If the jury *might* not have decided an issue, it will not be foreclosed. A court must decide whether a jury could have based its decision upon an issue other than that which the defendant seeks to preclude from consideration. *Ashe,* 397 US 444. It is noteworthy that this rule will generally favor the prosecution. If anything, error is likely to be in the prosecution's favor, because a jury will often determine many issues without the verdict and record revealing what it did. See note, Ashe v Swenson: *Collateral estoppel, double jeopardy, and inconsistent verdicts,* 71 Colum L R 321, 324 (1971).

In *Ashe,* the Supreme Court established that a reviewing court should presume a rational jury.

The Court stated that a reviewing court must "conclude whether a *rational* jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration." *Ashe,* 397 US 444. (Emphasis added.) The Supreme Court reiterated this presumption when it concluded in *Ashe* that "[t]he single *rationally* conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. And the jury by its verdict found that he had not." *Id.* at 445. (Emphasis added.)

In *Turner v Arkansas,* 407 US 366; 92 S Ct 2096; 32 L Ed 2d 798 (1972), a case factually similar to this case, the Court again presumed a rational jury. In *Turner,* the defendant, his brother, the decedent, and a fourth person played poker. Sometime after their game, the decedent was robbed and murdered. The defendant was charged with murder on a felony murder theory and acquitted, after which he was charged with robbery. The state's theory was that this second prosecution was not foreclosed by the earlier acquittal because the jury may have concluded that the defendant and his brother robbed the decedent, but that only the brother actually committed the murder. The Court rejected this leniency argument, stating that if the jury had "found petitioner present at the crime scene, it would have been obligated to return a verdict of guilty of murder," as provided by the judge's instructions that any party to the felony would be guilty of felony murder. *Id.* at 369. Thus, *Turner* indicates that possibilities of jury leniency or compromise are not to be taken into account in applying the *Ashe* rule of collateral estoppel.

The lead opinion states that "*Ashe* and *Turner* involve situations in which an appellate court was able to review the instructions and unequivocally determine that the jury had rendered a decision that precluded a subsequent trial." *Ante* at 459. A careful review of the trial record established that this is no less true in the case presently before us.[1] In defendant's first trial, the jury, after being instructed on the charges of felony murder, second-degree murder, and armed robbery, returned a verdict of guilty of second-degree murder. The jury had been carefully instructed that the only difference between second-degree murder and felony murder was the aggravating circumstance of armed robbery. If the jury had also found an armed robbery, it would have been obligated to return a verdict of first-degree felony murder. Because the jury did not return a verdict of guilty of first-degree murder, but did find second-degree murder, it must have acquitted defendant of armed robbery.

The lead opinion counters that "the jury *only* spoke with regard to second-degree murder" and did not render a full and valid judgment with regard to armed robbery. *Ante* at 480-487. In essence, the lead opinion has concluded that the jury *may* have acquitted the defendant in spite of what the law prescribes. That is, the jury, even though it concluded that defendant was guilty of second-degree murder and armed robbery, may have nullified the rigor of the criminal law and acquitted defendant of first-degree felony murder in an act of leniency or compromise. On the basis of this speculation, the lead opinion concludes that the defendant may again stand trial for armed robbery.

If this is in fact what the jury did in defendant's first trial, it acted within its powers, if not inconsistently. It has long been established that juries may so act. In *Dunn v United States*, 284 US 390;

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[1] For a full discussion and review of the trial record, see opinion of CAVANAGH, J. at 458.

52 S Ct 189; 76 L Ed 356 (1932), a case not involving double jeopardy, the United States Supreme Court held that inconsistent verdicts, i.e., verdicts that cannot be rationally reconciled, are not impermissible. In that case, the defendant was charged with three counts: maintaining a common nuisance by keeping for sale at a specified place intoxicating liquor, unlawful possession of intoxicating liquor, and unlawful sale of such liquor. The jury acquitted him of the second and third counts and found him guilty of the first. The defendant argued that the verdicts regarding the second and third counts were inconsistent with the verdict on the first count, and that he was therefore entitled to be discharged. The Court held that a defendant convicted by a jury of one count cannot attack the conviction because it was inconsistent with the verdict of acquittal of another count.

This rule makes good sense,[3] and in *People v Vaughn*, 409 Mich 463; 295 NW2d 354 (1980), this Court adopted it as applicable in this state. In pertinent part this Court justified the rule as follows:

> The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency. Since we are unable to know just how the jurors reached their conclusion, whether the result of compassion or compromise, it is unrealistic to believe that a jury would intend

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[3] As stated by Justice Rehnquist, the *Dunn* rule embodies a prudent acknowledgment of several factors. For example, inconsistent verdicts are not necessarily a windfall to the government at the defendant's expense; a jury convinced of guilt of several charges, may through lenity or compromise arrive at an inconsistent verdict. Moreover, a criminal defendant is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. See *United States v Powell*, 469 US 57; 105 S Ct 471; 83 L Ed 2d 461 (1984).

> that an acquittal on one count and conviction on another would serve as the reason for defendant's release. [*Id.* at 466.]

While I agree that a conviction should not be discharged on appeal because of an inconsistent verdict, this rule of inconsistent verdicts is inapplicable to the double jeopardy case at bar.

As the lead opinion itself states, an appellate court should not speculate regarding a jury's conclusions.[3] It is a well-established principle that it is not the proper role of this or any other appellate court to speculate with regard to what the jury may have been thinking. See, e.g., *People v Chamblis*, 395 Mich 408, 426; 236 NW2d 473 (1975). This rule against speculation is in part the basis for not permitting defendants to challenge inconsistent verdicts on appeal. In *Dunn,* Justice Holmes stated for the Court that "the [inconsistent] verdict may have been the result of compromise, or of a mistake on the part of the jury . . . . *But verdicts cannot be upset by speculation or inquiry into such matters.*" *Id.* at 394 (emphasis added). Nevertheless, it is such speculation that serves as the basis for the conclusion of the lead opinion that defendant may again stand trial for armed robbery.

If an appellate court is not to speculate, it must presume the jury will act in a particular manner. The Supreme Court clearly ruled in *Ashe* and *Turner* that a reviewing court must presume a rational jury in applying the doctrine of collateral estoppel. This may appear contrary to the Court's ruling in *Dunn* and its progeny. However, *Ashe* and *Dunn* present two very different contexts with different policy considerations. *Ashe* considers jury verdicts in the context of successive prosecutions and, specifically, the collateral estoppel doctrine. *Dunn* considers jury verdicts in simple appeals. As one commentator has stated:

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[3] *Ante* at 460, n 25.

> The *Ashe* and *Dunn* situations are distinctly different, however. In *Ashe* the assumption of the jury's rationality is made for the purpose of saving defendants from having to relitigate issues decided in their favor, in furtherance of the policy of the double jeopardy clause. Where a single jury verdict is involved, however, such a double jeopardy consideration is not relevant, and allowing to the jury a large measure of discretion would seem to comport with its role in the Anglo-American legal system. [Note, *supra,* 71 Colum L R 332-333.]

Hence, in the context of successive prosecutions, the presumption of jury rationality is necessary to guard the constitutional guarantee against double jeopardy and the interests it protects, such as harassment by the state and the preservation of the finality of judgments.

In conclusion, the jury's verdict in defendant's first trial may or may not have been the product of leniency or compromise. This Court cannot know the answer to this question, and it should not speculate. The United States Supreme Court, for sound reasons, has ruled that appellate courts should presume a rational jury when applying the doctrine of collateral estoppel.

LEVIN and CAVANAGH, JJ., concurred with BRICKLEY, C.J.

Michigan Supreme Court
Lansing, Michigan

Order

Entered: May 30, 1995

James H. Brickley
Chief Justice
Charles L. Levin
Michael F. Cavanagh
Patricia J. Boyle
Dorothy Comstock Riley
Conrad L. Mallett, Jr.
Elizabeth A. Weaver
Justices

Rehearing No. 332

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

FRANK GARCIA,

Defendant-Appellee.

SC 98969
CoA 129181
LC 85-5673-FC

In this cause, a motion for rehearing is considered, and it is hereby DENIED.

Weaver, J., not participating.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

May 30, 1995 Corbin R Davis
Clerk

EDITOR'S NOTE

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NO.: 95-324

Supreme Court, U.S.
FILED
OCT 24 1995
CLERK

IN THE
SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1995

STATE OF MICHIGAN
PETITIONER,

-vs-

FRANK GARCIA
RESPONDENT.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

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35 pp

QUESTION PRESENTED

Should this Court deny certiorari where a state court has exhaustively decided a case is accordance with its law that is in harmony with and meets the standards of the clear and controlling law, two unanimous decisions of the United States Supreme Court as to implied acquittal precluding retrial as to lesser offenses, but which decision is independently justifiable according to the well settled collateral estoppel doctrine and the same transaction test, but also since the Defendant was literally twice placed in jeopardy?

TABLE OF CONTENTS

PAGE

Question Presented.................................... i

Index to Appendix..................................... iii

Index to Authorities.................................. iv

Response to Petition for Certiorari to the Supreme Court of the State of Michigan............. 1

Counter Statement of Facts............................ 2-4

Reasons for Denying Writ.............................. 5-20

Conclusion.. 21

Appendix.. 1a-9a

(INDEX TO APPENDIX)

PAGE

1. (People's) Application for Leave to Appeal and Concise Statement of Proceedings and Facts (Filed with the Michigan Supreme Court in 1988)
   POINT: The Prosecutor took the position before the Michigan Supreme Court that the jury was properly instructed.............................. 1a

2. Michigan Court of Appeals Decision dated October 19, 1988, Reversing Verdict in Trial One (1).Garcia 88
   POINT: The Court of Appeals holding related to the lack of a jury option of not guilty; it did not make a holding relating to a jury option allowing verdicts of both second degree murder and armed robbery....................... 2a

3. Trial One (1) Vol. VIII Pages 127 and 128
   POINT: The Prosecutor did not object to the verdict options given to the jury.......... 3a-4a

4. Prosecutor's Answer: Motion to Quash
   POINT: Prosecutor agreed Garcia could not be retried on first degree murder. Prosecutor thought Garcia waived claim of double jeopardy relating to armed robbery................................. 5a-6a

5. Trial One (1) Vol. VIII Pages 136 and 137
   POINT: The jury asked a question resulting in the judge explaining that armed robbery was the difference between first degree felony murder and second degree murder......................... 7a-8a

6. Trial One (1) Vol. VIII Page 6
   POINT: The Prosecutor moves to have the Court instruct on armed robbery because it is such an integral part of the case........ 9a

(INDEX TO CASES & AUTHORITIES)

CASES **PAGE**

Garcia 88,CA 94233 (Oct. 19, 1988)..................... 7,16,17

Garcia 94, 203 Mich App 420, 513 NW2d 425 (1994)........ 9,11

Grady v Corbin, 495 US 508, 109 L Ed 2d 548,
110 S Ct 2084..................................... 17

Green v United States, 355 US 184, 2 L Ed 199,
78 S Ct 221 (1957) 10,12,19

Harris v Oklahoma 433, US 682, 53 L Ed 2d 1054,
97 S Ct 2260 (1980) 11,12,13

Illinois v Vitale, 477 US 410, 65 L Ed 2d 228,
100 S Ct 2260 (1980) 11

Payne v Virginia, 468 US 1062; 104 S Ct 3573;
82 L Ed 2d 656 (1969).............................. 11,12,13

People v Deneweth, 14 Mich App 604;
165 NW2d 910 (1968)................................ 10,11

Sekou v Blackburn, 796, F2d 108 (CA5 1986) 11

UNITED STATES v LONG, 463, US 1032 (1983) 5

NO.: 95-324

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1995

State of Michigan,
Petitioner

-vs-

Frank Garcia,
Respondent.

BRIEF IN OPPOSITION OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MICHIGAN

NOW COMES Frank Garcia by Arnold D. Dunchock of LAWYERS' OFFICES and prays that a Writ of Certiorari will not issue to review the Judgement of Supreme Court of the State of Michigan filed on April 18, 1995, rehearing denied, May 30, 1995, which upheld a Michigan Court of Appeals decision reversing Respondent's conviction for a crime of armed robbery on double jeopardy grounds.

(COUNTER STATEMENT OF FACTS)

TRANSACTIONAL:

The Petitioner herein substantially cites the facts cited by the Michigan Court of Appeals, but does not accept the legal conclusions of the Panel. The Respondent's position opposes the Petitioner's position.

The facts indicate Co-Defendant, Ronald Hammond, entered a car driven by the eventual victim, Timothy Kiley, for the purpose of joyriding. Frank Garcia, the Defendant herein, unwillingly entered the car.

The victim died as a result of an accidental shooting by Ronald Hammond. There is absolutely no evidence that Frank Garcia contributed to the killing of Timothy Kiley.

PROCEDURAL:

A jury trial was held and the jury had, among other options, options of two counts that related to armed robbery. The first option was armed robbery as the underlying felony for the first degree felony murder charge. The jury also had an option to find the Defendant guilty of armed robbery through a free standing verdict option of armed robbery.

The Michigan Court of Appeals reversed the verdict of second degree murder, holding that the jury had not been afforded an option of a general verdict of not guilty, because of a defective jury verdict form as well as defective instructions. The Prosecutor did not criticize the jury verdict form; instead the Prosecutor argued forcefully to the Michigan Supreme Court in 1988 that the verdict form was quite satisfactory. [App 1a]

Prior to the second trial the Defendant filed a Motion to Quash. The Petitioner correctly states that the trial judge granted the Motion. The prosecution fails to state the trial judge began his decision by discussing double punishment and then ended his decision, by using a literal interpretation of what the Court of Appeals said to justify the granting of the Motion to Quash.

Although it is true that the Prosecutor appealed to the Michigan Court of Appeals, the Michigan Court of Appeals indicated that their prior opinion did not preclude a retrial on armed robbery. What the Prosecutor fails to mention was that the Michigan Court of Appeals decision was based on answering the peculiar language of the trial court's opinion.

The Defendant was retried for second degree murder, and possession of a firearm during the commission of a felony, but was acquitted on both; the Defendant was convicted of armed robbery.

The Michigan Court of Appeals vacated the verdict regarding armed robbery holding retrying the Defendant on armed robbery violated his protections against double jeopardy.

The appeal to the Michigan Supreme Court by the Prosecutor was the third time the Prosecutor had initiated an appeal in this cause. The Michigan Supreme Court affirmed, and after a Petition for Rehearing by the Prosecutor reaffirmed the result reached by the Court of Appeals. Those voting to affirm the result based their decision on the doctrines of implied acquittal, collateral estoppel and the same transaction test.

(REASONS FOR DENYING WRIT)

I.

There are some preliminary considerations that, in and of themselves, warrant a determination this is not a case justifying the granting of a Writ of Certiorari.

This matter was tried twice within the State of Michigan; there have been five appellate reviews/decisions, plus a re-hearing by the Michigan Supreme Court. The State of Michigan exhaustively, if not fully, considered this matter before rendering its final decision.

The decision is based on Michigan law. See **Long v United States** 463, US 1032 (1983). While the Respondent recognizes that the United States Supreme Court can review a decision of a state's highest court, the situation is different than the review of a decision commenced within the federal system. A state is allowed the latitude of rendering a decision which is more protective of United States Constitutional Rights than required under a minimal federal standard.

The facts are further that the Defendant was incarcerated from December 6, 1985 until June 13, 1995, but that he has been released since that time. The points being that this matter has been fully litigated by the Michigan Court System; if the United States Supreme Court eventually grants the ultimate and full relief sought by the Prosecutor, there would be the further anomaly of someone being returned to prison after a State's Supreme Court agreed with a State's Appellate Court that the Defendant should not have ever been re-tried on armed robbery, but even so was incarcerated for an additional six years. As the Respondent understands it, even if Certiorari was granted there would be a further period of uncertainity and seeming chaos as to whether the Defendent was or was not a convicted felon and whether he was or was not going to stay or return to prison. This would be harsh and cruel to the Defendant. This case is sui generis. Granting of this Writ would tend to create confusion and disrespect for the American Judicial System.

II

The appeal to the Michigan Supreme Court, like the Petition to this court, was at the behest of the Prosecutor, rather than the Defendant. That this is a prosecutorial petition, considered together with some actions and inactions of the Prosecutor provides a basis for not granting the Writ. The Prosecutor's actions are far worse than a mere failure of the Prosecutor to properly preserve an issue. Instead, this is a case where the basis that the Prosecutor is claiming for relief is contraindicated by the procedural facts of this case.

It is important to note what the reversible error was at the first trial; it was not the error the Petitioner claims as a basis for discrediting the implied acquittal doctrine basis as a justification for the reversal of the jury verdict in trial one.

The instructional error was that the trial judge did not afford the jury the option of a general verdict of not guilty or alternative options of not guilty to the individual options of guilty put to the jury. That that was the instructional error is evidenced by the the following language in the Michigan Court of Appeals decision entitled **Garcia 88**, CA 94233 (Oct. 19, 1988): [App 2a]

The transcript of trial one reveals the Prosecutor failed to object to the jury not having a full opportunity to decide. [App 3a-4a] Instead, the jury was discharged without the Prosecutor raising this as an objection.

While the Prosecutor had sought a conviction for first degree murder, there is no evidence that it even occurred to the Prosecutor after the verdict for second degree murder was read to be disappointed that there was not another finding of guilty as to armed robbery. In Michigan first degree felony murder mandates a life sentence without elgibility for parole. Second degree murder and armed robbery, either or both, are life sentence charges, but which allow for parole. Shiawassee County is a one Circuit Judge county, meaning there is only one judge's propensities to know. It was well known that the judge was going to and did sentence the Defendant to life imprisonment. The Defendant had only his one life to serve even if the court would have sentenced him to a time greater than what he had already been sentenced.

To the contrary, the positions taken by the Prosecutor soon thereafter provided further confirmation of the mindset of the

Prosecutor after the verdict was read and before the jury was discharged in the first trial. The Prosecutor argued to the Michigan Supreme Court in 1988 that the jury verdict form in trial one was quite acceptable; the Prosecutor argued there was nothing wrong with the jury verdict form, or the verdict of second degree murder, when they attempted to argue forcefully for a reinstatement of the verdict of second degree murder. Nowhere in that appeal to the Michigan Supreme Court did the Prosecutor so much as articulate what they now claim is a glaring instructional error; the Prosecutor certainly did not complain that the jury did not have a full opportunity that might have resulted in an additional verdict of armed robbery.

The point of the Defendant is that this is beyond a matter of the Prosecutor failing to preserve the issue of what they now claim is instructional error, warranting a negating of the Constitutional protection against double jeapordy. Rather, this is a matter of the Prosecutor attempting to mislead the United States Supreme Court by reversing the position, previously taken.

The Prosecutor in opposition to the Defendant's Motion to Quash before the second trial agreed that the Defendant would be barred from a retrial on first degree murder based on double jeapordy; but the Prosecutor erroneneously believed that the Defendant had waived his right to claim double jeopardy as it applied to armed robbery because the Prosecutor believed that the reversal of the second degree murder conviction allowed a retrial as to armed robbery. [App. 5a-6a]

Instructional error in trial one was not a concern voiced by the Prosecutor in response to the Defendant's appeal, raising double jeopardy, after trial two. The position which the Petitioner now claims as a basis for reversing the decision of Michigan's highest court was not raised before the Michigan Court of Appeals decision, **Garcia 94**, 203 Mich App 420, 513 NW2d 425 (1994), vacating the verdict of armed robbery in the trial two. The Prosecutor did not specify what the supposed evil of the full opportunity was until the point was raised by a Justice of the Michigan Supreme Court, during oral arguments. The Prosecutor stated thereafter that the lack of full opportunity referred to the option to convict for both second degree murder and armed robbery. The Prosecutor, Randy O.Colbry, who made the statement about the supposed defect was the second Prosecutor to succeed the Prosecutor, David McClernan, who was the Prosecutor present when instructions were given during the first trial.

The Respondent's position is that the argument most highly stressed by the Petitioner was not based on a real wrong noted by the Prosecutor at the time of the rendering of the verdict in the first trial; instead this is a distant afterthought voiced by someone other than the Prosecutor who tried the first trial.

The Petitioner argues that the doctrine of implied acquittal should not have been applied herein as instructional error at the Defendant's first trial prevented the jury from actually adjudicating the merits of the lesser included offense sought to be strickened at the retrial. As has been elaborated, there was no concern at the relevant time by the Prosecutor for the first jury to have been able to add a verdict of armed robbery to the verdict of second degree murder. But whether there could have or even was a possible objection, it was not preserved by the Prosecutor and therefore should not be a basis for reviewing double jeopardy here. The record is clear that the only instructional error did not relate to the possibility of an extraneous jury option for armed robbery: The instructional error was, and only was, that the jury was not afforded an option of a general verdict of not guilty or an option of not guilty for every possible guilty option. There is not a preserved factual basis for the Petitioner's position that instructional error prevented implied acquittal from being operable.

Turning to the analysis of legal authority, even the Petitioner concedes that the doctrine of implied acquittal is a valid doctrine and is a valid basis for precluding retrial in certain circumstances. **Green v United States**, 355 US 184, 2 L Ed 199, 78 S Ct 221 (1957) holds that conviction on a lesser offense precludes re-prosecution on a higher offense based on the doctrine of implied acquittal. The Prosecutor clearly acknowledged his acceptance of **Green** since the Prosecutor did not attempt to retry Garcia on first degree felony murder after the verdict of second degree murder was overturned by the Michigan Court of Appeals in 1988. The equivalent of **Green** in Michigan was and is **People v**

Deneweth, 14 Mich App 604; 165 NW2d 910 (1968).

The Petitioner's challenge to the doctrine of implied acquittal is limited to the application of implied acquittal as precluding retrial as to a lower offense. The two United States Supreme Court cases that control are **Harris v Oklahoma** 433, US 682, 53 L Ed 2d 1054, 97 S Ct 2260 (1980) and **Payne v Virginia**, 468, US 1062; 1041 S Ct 3573; 82 L Ed 2d 802 (1984). The Petitioner concedes on page 41 that double jeopardy bars prosecution for both felony murder and the underlying felony. The Respondent's view is that the Petitioner's concession is only partially acurate as **Harris** barred retrying of the underlying felony after conviction for the higher felony. The Petitioner does not directly attack **Harris/Payne**. This is significant since the Michigan Supreme Court decision was split, such that the well written opinion of the Michigan Court of Appeals **Garcia 94**, stands. And the legal cornerstone of **Garcia 94** is **Harris/Payne**. The Petitioner instead relies on **Illinois v Vitale**, 477 US 410, 65 L Ed 2d 228, 100 S Ct 2260 (1980) and **Sekou v Blackburn**, 796, F2d 108 (CA5 1986). **Vitale** and **Sekou** do not invalidate **Harris** as it applies to **Garcia** as they are more in the nature of double punishment cases rather than sucessive prosecution cases. The Respondent recognizes that **Harris** and **Payne** are sucessive prosecution after conviction cases, but they are indistingishable from sucessive prosecutions after acquittal under general principles of double jeopardy law. The Petitioner has provided no case authority underminig that **Harris/Payne** would apply to a sucessive prosecution after acquittal as well as after conviction.

The Petitioner makes reference to the language in **Green**, qualifying the application of implied acquittal to those situations where the jury has had a full opportunity to render a decision. The Petitioner attempts to use **Green** as a basis to undermine the **Harris/Payne** doctrine and the reliance on that doctrine by the Michigan Supreme Court. Even if there had been a factual basis, which there is not here, **Green** has been improperly cited as authority for the position advanced by the Petitioner. What the Petitioner is actually seeking here is a reversal of **Green**, which again is clearly not warranted here.

The first **Garcia** jury did have a full opportunity to convict **Garcia** of first degree felony murder, second degree murder and armed robbery. What was the fatal defect was that the jury did not have a full opportunity to acquit. Again the mouthing of a concern that the jury did not have an alternative of both second degree murder and armed robbery is neither genuine, nor well preserved.

It is hard to imagine a worse set of facts upon which to claim lack of a full opportunity for a jury to decide. The opportunity that was not fully presented to the jury was to acquit. To say this is the kind of compelling situation that would warrant negating the clear language of the double jeopardy clause is absurd.

While there were multiple doctrines, each lending further support to the other as a basis for the ultimate decision, the doctrines can and do on an individual basis provide an ample basis for not disturbing the final determination of the Michigan Courts on **Garcia**.

III.

The Petitioner makes reference in their Question Presented that there is a need:

> ....to clarify double jeopardy jurisprudence where the decisions throughout the country on the quetion of whether the doctrine of "implied acquittal" operates to preclude a retrial of lesser-included "preedicate" offense which operates to aggravate a greater offense ...

The Position of the Respondent is the Petitioner has failed to specify what about double jeopardy needs to be clarified. References are also made to a "disarray" relating to the doctrine of "implied acquittal" however, there is a failure to cite just what cases are in "disarray" in relation to what other cases.

There is no "disarray". The United States Supreme Court has spoken clearly and unanimously in two cases that control. Those cases are **Harris** and **Payne**.

IV.

A position of the Respondent is that based on the preliminary considerations and based on the showing that there is not a basis for reversing the implied acquittal doctrine as applied by the

Michigan Supreme Court, there really is no reason justifying an exhausted analysis of the doctrines of collateral estoppel and the same transaction test. What has been stated so far should be sufficient to warrant a denial of the Writ of Certiorari. Whereas the Petitioner attempts to convince the Court there is some new or different law worthy of consideration by this Court regarding implied acquittal, there is no such pretense regarding collateral estoppel and the same transaction test. In some portions of the Petition, particularly within the Question Presented section, nothing is mentioned other than implied acquittal. The Respondent has decided to address rather than to ignore these two doctrines, anyway, because they do provide two bases, independent of implied acquittal, and each other to justify not disturbing the result reached by the Michigan courts. To consider otherwise would not be some minor modification of implied acquittal, but rather would be to undermine centuries of cases construing double jeopardy, and perhaps effectively, double jeopardy itself.

The doctrine of collateral estoppel is a basis for the opinions of both Justices Cavanaugh and Brickley. Collateral estoppel is a cornerstone of the Anglo American system of justice. The civil aspect of the doctrine is known as res judicata; the criminal aspect is known as double jeopardy. It is also based on logic, common sense and practicality. The principle is that once a matter has been adjudicated through litigation, it will not be relitigated.

The Petitioner attempts to distingish the doctrine of collateral estoppel as it applies here, particularly as it relates to Chief Justice Brickley and his focus on a rational jury. The Respondent submits that there is objective evidence that should lead one reasonably to beleive that the jury did act rationally and particularly as it relates to the aspects pertinent to collateral estoppel.

During the course of deliberations in the trial one the jury asked a question to the judge asking that the judge explain the difference between first and second degree murder. There was no other question asked, such as being able to find the Defendant guilty of both second degree murder and armed robbery. [App 7a-8a]

That the jury had honed in on the difference between first and second degree murder is clear from the exchange with the judge. The judge clearly responded to their question by explaining what armed robbery was and how a finding or not finding of armed robbery would have on the difference between first degree murder and second degree murder. The record indicates clearly that quite soon after the panel returned to the jury room with their question relating to armed robbery having been answered, they returned with a verdict. That verdict was second degree murder, only. The sequence of these transparent events and the time span leads a rational inferer to infer that the jury was acting rationally and knew full well that they were exercising an option to distingish first degree murder from second degree murder by not finding armed robbery. The jury was not only rational, but they were true to their oath to follow the judge's instructions. There is no basis in fact for speculating that this jury was not rational. The facts are not present here to justify the Court expressing such a lack of respect for a jury to be rational.

The Petitioner also attempts to argue that collateral estoppel does not apply as the result in trial one was not final. An aspect of collateral estoppel is that it only need to relate to an aspect or a fact material to the case and need not relate to all the aspects of a given case.

The Michigan Court of Appeals decision rendered in 1988 **Garcia 88** held that there could not be a retrial on first degree murder as doing so would violate the Defendant's protections against double jeopardy. This was in addition to reversing the conviction of second degree murder based on the fact that the verdict form and instructions did not allow for a general verdict of not guilty. The appeal of the Prosecutor to the Michigan Supreme Court was restricted to attempting to have the second degree murder conviction reinstated. The Prosecutor made absolutely no reference to a concern that upon retrial the Defendant could not be retried as to first degree felony murder. By the Prosecutor not challenging the ability of the Prosecutor to retry the matter on first degree murder, the Prosecutor conceded that a final determination had been made that double jeopardy precluded retrial on first degree felony murder aspect of the case. The Prosecutor was thereby effectively agreeing that he was collaterally estopped from pursuing the armed robbery aspect of the case in future litigation.

Justice Cavanaugh also bases his decision on the same transaction doctrine. This is also a basis which has been accepted and followed by the United States Supreme Court. A lead case in this area is the **Grady v Corbin**, 495 US 508, 109 L Ed 2d 548, 110 S Ct 2084 (1990), case. The doctrine provdes another test to determine whether double jeapordy applies. A determination that has to be made is whether or not the Defendant was subjected to sucessive trials involving the same factual transaction.

The Prosecutor argued over the objection of the Defendant, prior to the matter being submitted to the first jury, that a jury option for a free standing verdict of armed robbery was in order, based on the admitted evidence relating to armed robbery. [App 9a]

Independant of the admission of the Prosecutor, a review of the records of the two trials would lead a fair minded person to find that armed robbery was an integral part of the factual transactions in both cases. Perhaps an indication was that the Prosecutor did not challenge that portion of **Garcia 88** that held that Garcia could not be retried on first degree felony murder; yet, there is objective evidence, to-wit: The armed robbery count before the second trial, indicative that when it came time for the then Prosecutor, Ward Clarkson, to retry the matter, he found the armed robbery aspect of the transaction to be essential in the presentation of a coherent transaction. All this is another way of saying that Garcia, as a matter of fact, was subjected to two trials involving essentially the same facts relating to the same armed robbery allegation. Doing so was in violation of the same transaction doctrine involving double jeopardy. Violation of the same transaction doctrine was, in itself, a basis for upholding the vacatur of the armed robbery conviction in the second trial.

The last basis for not disturbing the result is based on what the Respondent considers to be actual, literal or classical double jeopardy. The Respondent recognizes that however compelling this seems to be to the Respondent, it has not been adopted or articulated by the Michigan Court System as a basis for sustaining the result.

The Respondent asks the Court to consider that there is still another basis above and beyond the bases provided by the Michigan Court of Appeals and the Michigan Supreme Court. The Fifth Amendment to the United States Constitution bars one from being twice put in jeopardy for the same crime. Doctrines construing double jeopardy have been analyzed in great detail herein. The Respondent asks the high court to consider that the violation of the Fifth Amendment is so direct and clear that there should not be a need for any sophisticated, complicated analysis. A jury that had been sworn in 1986 went into a jury room with a pen and a verdict form with Frank Garcia's name on it that contained jury verdict option for armed robbery as an element of first degree felony murder. There also was a verdict option for armed robbery. In 1989 another jury that had been sworn was supplied with a pen and verdict form with Frank Garcia's name on it that had a jury option for armed robbery relating to the same incident as did the verdict form in 1986. Frank Garcia was twice placed in jeopardy as to the same offense. This in and of itself, and independant of any other doctrine, is double jeopardy.

Based on the multiple, but independently justifiable doctrines as set forth herein the result of the Michigan Supreme Court should not be disturbed. This is in addition to the other factors previously set forth which are a bases for this Court not to become involved.

The Respondent suggests the high Court reaffirm the essence of **Green**:

> The underlying idea, one that is deeply ingrained in at least the Anglo American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. [**Green v United States**, 355 US 184, 187-188 (1957)]

The Respondent has not only been subjected to double jeopardy, but now has been subjected to five appeals, three of which have been instituted by the Prosecutor.

(CONCLUSION)

For all of the compelling reasons set forth the Petitioner's Request for a Writ of Certiorari should be denied.

Respectfully Submitted,

Frank Garcia,
Respondent,
In Forma Pauperis

Arnold D. Dunchock,
Attorney for Respondent

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(PEOPLE's) APPLICATION FOR LEAVE TO APPEAL AND CONCISE STATEMENT OF PROCEEDINGS AND FACTS (FILED WITH THE MICHIGAN SUPREME COURT IN 1988)
POINT: The Prosecutor took the position before the Michigan Supreme Court that the jury was properly instructed in trial one (1).

12. On October 19, 1988 the Court of Appeals panel (Weaver, PJ; Shepherd, J; Brouillette, CirJ) filed its unpublished per curiam opinion affirming Hammond's conviction and reversing Garcia's convictions and remanding for a new trial on second degree murder and felony firearm. A photocopy of the Court of Appeals opinion is attached.

13. On all of the issues raised by Garcia and briefed by the parties, the Court of Appeals held for the People of the State of Michigan, plaintiff-appellee. However, the court on its own motion raised the issue of a defect in the jury verdict form and determined that the form deprived the jury of the opportunity to render general a verdict of not guilty. The court of Appeals found that a miscarriage of justice had occurred and reversed and remanded for a new trial, but precluded re-trial on first degree murder.

14. The People, as appellant, seek leave of this court to appeal from only that portion of the Court of Appeals opinion which reversed the Garcia convictions.

15. The Court of Appeals' decision is clearly erroneous and will cause a material injustice, MCR 7.302(B)(5). Garcia was tried on sufficient evidence before a properly instructed jury and was convicted. Yet, the People will be put to the considerable expense of an unnecessary re-trial, and the family of the victim will be put through the trauma of having to re-live this horrifying event.

MICHIGAN COURT OF APPEALS DECISION DATED OCTOBER 19,1988, REVERSING VERDICT IN TRIAL ONE (1)
POINT: The Court of Appeals holding related to the lack of a jury option of not guilty; it did not make a holding relating to a jury option allowing verdicts of both second degree murder and armed robbery.

The jury returned a verdict of guilty of second degree murder.

/The jury instructions and verdict form constituted reversible error with regard to Count I because they did not give the jury the opportunity of returning a general verdict of not guilty. If the verdict form had included a box through which the jury could have found Garcia not guilty of second-degree murder and not guilty of armed robbery, then this Court would not find that the verdict form resulted in a miscarriage of justice. Not at least giving the jury a method to make such a finding under these facts requires reversal./

We turn to whether Garcia's felony-firearm conviction can stand in light of our reversal of his second-degree murder conviction. With regard to Count I, the jury instructions and verdict form improperly failed to give the jury the opportunity to return a general verdict of not guilty. With regard to Count II (felony-firearm), the jury was given the appropriate alternatives of finding Garcia guilty or not guilty. Jury verdicts need not be consistent. People v Vaughn, 409 Mich 463; 295 NW2d 354 (1980). The jury could properly have convicted Garcia of the felony-firearm charge, while acquitting him of the underlying felony. People v Lewis, 415 Mich 443; 330 NW2d 16 (1982). However, appellate courts do not have the option of

TRIAL I VOL. VIII PAGES 127 and 128
POINT: The Prosecutor did not object to the verdict options given to the jury.

to look at the guns, write a note to the bailiff and we will have you brought back into the courtroom and you can examine the weapons, both of which are marked now as exhibits -- one of them I remember I think it was prosecution's Exhibit 13. And I don't remember the other number, but I think we all know what we're talking about.

MR. DUNCHOCK: I think it was the first defense.

THE COURT: First defense; okay.

Now, in this case, you've already been told that there's going to be a number of possible verdicts. And I prepared for you written verdict forms which will go into the jury room with you.

And as to each count, only one of the possible verdicts may be returned by you on each of those counts.

If you have all agreed upon one verdict for each count, then your foreperson should mark that verdict, and the other verdicts are to be left unmarked.

Basically, you will see that I have prepared a verdict form that states: Count I, First Degree Murder. That verdict form which, again, will go in the jury room, reads as follows.

You may return only one verdict on this charge. Mark only one box for this count. First box states: Not Guilty of First Degree Felony Murder. The next box states: Guilty of First Degree Felony Murder or Guilty of the lesser included offense of, next box states: Second Degree Murder. And the next box states: Armed Robbery.

As to Count II, possession of a firearm at the commission -- at the time of the commission of or attempted commission of a felony; that is, felony murder, your verdict forms reads: possible verdicts. You may return only one verdict on this charge. Mark only one box for this count.

First box is: Gulity of Possession of a Firearm at the time of Commission or Attempted Commission of a Felony, Felony Murder. And the next box is: Not Guilty of Possession of a Firearm at the time of the Commission or Attempted Commission of a Felony; that is, Felony Murder.

Does either counsel, Mr. McClernan or Mr. Dunchock, have any comments, objections, or exceptions to the instructions just now given to the jury?

Mr. McClernan?

MR. McCLERNAN: I have none, your Honor.

THE COURT: Mr. Dunchock?

PROSECUTOR'S ANSWER: MOTION TO QUASH

POINT: Prosecutor agreed Garcia could not be retried on first degree murder. Prosecutor thought Garcia waived claim of double jeopardy to armed robbery.

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF SHIAWASSEE

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

-vs-

FRANK GARCIA,
Defendant./ FILE NO. 85-5673FC

ANSWER AND OPPOSITION TO DEFENDANT'S MOTION TO QUASH ARMED ROBBERY COUNT

NOW COME the People of the State of Michigan by and through Ward L. Clarkson, Prosecuting Attorney in and for the County of Shiawassee, and in opposition to Defendant's Motion state:

1. That answering paragraph 1 of Defendant's Motion, the People admit the allegations contained therein.

2. That answering paragraph 2 of Defendant's Motion, the People admit the allegations contained therein.

3. That answering paragraph 3 of Defendant's Motion, the People admit the allegations contained therein.

4. That answering paragraph 4 of Defendant's Motion, the People admit the allegations contained therein.

5. That answering paragraph 5 of Defendant's Motion, the People admit the allegations contained therein.

6. That answering paragraph 6, the People deny the allegations contained therein and would state that defendant was in jeopardy of being convicted of Armed robbery by virtue of the Armed Robbery alternative.

7. That answering paragraph 7 of Defendant's Motion, the People admit the allegations contained therein.

8. That answering paragraph 8 of Defendant's Motion, the People admit the Court of Appeals ruled that on retrial defendant cannot be charged or convicted of First-Degree Murder,

lesser offense of Armed Robbery from going to the jury. By seeking a new trial, the defendant waives his double jeopardy claim.

9. That answering paragraph 9 of Defendant's Motion, the People admit the allegations contained therein.

10. That answering paragraph 10 of Defendant's Motion, the People admit the allegations contained therein.

11. That answering paragraph 11 of Defendant's Motion, the People state that the information now contains a count for Armed Robbery.

12. That the People incorporate by reference the attached memorandum of law.

WHEREFORE, the People pray defendant's Motion to Quash be Denied.

DATED: May 1, 1989

Ward L Clarkson

WARD L. CLARKSON (P 36073)
PROSECUTING ATTORNEY

TRIAL ONE (1) VOL. VIII PAGES 136 and 137

POINT: The jury asked a question resulting in the judge explaining again that armed robbery was the difference between first degree felony murder and second degree murder.

and your note reads: What are the conditions for second degree murder?

And if I'm understanding the note, it is asking essentially for the Court to give you the elements of second degree murder as I've instructed; correct?

THE JURY: Yes.

THE COURT: The jury is nodding up and down affirmatively. And I am going to at this point reread the second degree murder instruction that I gave to you earlier with all of the instructions. And I'm going to reread it precisely as I gave it earlier today, so that that will remain consistent with what you recall having been read to you.

Keep in mind that as I reread this one instruction, which is one of several instructions that I've given you so far today, that you are to take this into consideration and in the light of the rest of the instructions that I've already given to you.

You will recall that I started out then, after telling you that second degree murder is a necessarily lesser included offense of first degree felony murder, that the difference between first degree felony murder and second degree murder is that for second degree murder the Defendant Frank Garcia need not have been in the commission of the crime of armed robbery at the time of the act which caused the victim's death.

If you find the Defendant guilty of murder, it is your duty to state the degree in your verdict; that is, that he is guilty of First Degree Murder; that is, Felony Murder, or Second Degree Murder.

To establish second degree murder, the prosecution must prove each of the following elements beyond a reasonable doubt.

First, that the deceased, Timothy Roger Kiley died on or about December 3, 1985, within the County of Shiawassee, State of Michigan.

Second, that his death was caused by the Defendant; that is, that Timothy Roger Kiley died as the result of a bullet wound to the head.

Third, if you find that the death of Timothy Roger Kiley was caused by the Defendant Frank Garcia, you must determine whether the Defendant is guilty of any crime.

The killing of a human being by another may be entirely innocent. It is not the act of killing in itself which makes it a crime, but the state of mind with which it is done.

Forth, for second degree murder, you must find that the Defendant acted with a certain state of mind

TRIAL ONE (1) VOL. VIII PAGE 6
POINT: The Prosecutor moves to have the Court instruct on armed robbery because it is such an integral part of the case.

of the greater offense; that is, it must be impossible to commit the greater without first having committed the lesser.

There is no need for the trial court to examine the evidence. A request to charge on a necessarily included offense alone triggers the obligation to charge.

Your Honor, here we are asking that the Court instruct the Jury on the lesser included offense of armed robbery. It is obviously under this definition and any other reasonable definition, a necessarily included lesser offense inasmuch as it would be impossible to commit the principal offense, that is here felony murder, without having first committed the named offense, underlying felony; that being felony -- excuse me, armed robbery.

And so, therefore, the People submit that this fits squarely under the law in Chamblis, Ora Jones, and also in the Wilder case, which also included felony murder based upon a robbery.

THE COURT: Thank you, Mr. McClernan.

Mr. Dunchock, any response or comments?

MR. DUNCHOCK: The position of Frank Garcia is that he opposes anything other than the mandatorialy included offense, second degree murder, pursuant to